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The Effect of Booker on Federal Sentence Modification Proceedings: How the Tenth Circuit Got It Right in Rhodes

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THE EFFECT OF *BOOKER* ON FEDERAL SENTENCE MODIFICATION PROCEEDINGS: HOW THE TENTH CIRCUIT GOT IT RIGHT IN *RHODES*

INTRODUCTION

In *United States v. Rhodes*,[1] the Tenth Circuit was tasked with deciding whether sentence modification proceedings would be governed by the Supreme Court's decision in *United States v. Booker*.[2] The *Booker* Court held that the Federal Sentencing Guidelines were unconstitutional when binding on federal judges.[3] The Tenth Circuit's decision in *Rhodes* determined whether the Guidelines would be binding on federal judges in sentence *modification* proceedings—rather than initial sentencings—or whether judicial discretion to craft lower sentences was authorized.

In *Booker*, the Supreme Court was silent on how its decision affected sentence modification proceedings. The Ninth Circuit addressed this unanswered question in 2007, and held that *Booker* applies to modification proceedings.[4] In *Rhodes*, the Tenth Circuit broke from the Ninth and held that *Booker* does not apply to sentence modification proceedings.[5] Thus, according to *Rhodes*, federal sentencing judges must strictly adhere to the Guidelines when imposing sentence modifications.

The key to the *Rhodes* decision is the Tenth Circuit's willingness to distinguish between original sentencing proceedings and sentence modification proceedings. *Booker* applies to original sentencing proceedings, and therefore, the court differentiated sentence modification proceedings in order to preserve the mandatory nature of the Guidelines in modification actions. The Tenth Circuit distinguished the proceedings on two bases: (1) separate statutes authorize the respective proceedings; and (2) the two statutes contain substantively different language.[6] Sentence modification proceedings are governed by 18 U.S.C. § 3582(c).[7] This provision allows for a sentence to be adjusted if the Sentencing Commission lowers relevant guidelines.[8] Modification is not available to increase an already imposed sentence.[9] Sentence modification is a strictly optional proceeding, granted at the discretion of the court, which may decrease an

1. 549 F.3d 833 (10th Cir. 2008).
2. 543 U.S. 220 (2005).
3. *See id.* at 244.
4. United States v. Hicks, 472 F.3d 1167, 1169 n.3 (9th Cir. 2007).
5. *Rhodes*, 549 F.3d 833, 840 (10th Cir. 2008).
6. *Id.* at 840.
7. 18 U.S.C. § 3582(c) (2006).
8. *Id.* § 3582(c)(2).
9. *See id.* § 3582(c).

individual's period of incarceration or probation.[10] The majority of courts have held that a proceeding under this statute is not a full resentencing of the defendant.[11]

Original sentencing proceedings, on the other hand, are governed by 18 U.S.C. § 3553.[12] Amongst other provisions, the statutory language in § 3553 sets forth the factors the judge will weigh in making a sentencing decision.[13] Based on interpretation of these factors, the judge must impose a sentence that is reasonable given the facts and circumstances of the conviction. This process is more expansive than the narrower sentence modification proceeding because judges are often called upon to make additional findings of fact in an original sentencing proceeding.[14] These findings affect the length or severity of the sentence a judge imposes, permitting either an increase or decrease in the recommended base sentence.[15] Sentence modification proceedings are substantively different, because they only allow for a downward departure from the original sentence.

This Comment argues that the Tenth Circuit came to the correct decision in holding that Booker does not apply to sentence modification proceedings—effectively eliminating any discretion for federal sentencing judges to impose a sentence that departs from the Guidelines in modification proceedings. Part I of this comment outlines the history of the Federal Sentencing Guidelines to provide an appropriate background to analyze the subsequent cases. Part II discusses the Supreme Court's seminal decision in *United States v. Booker*. Part III discusses the Ninth Circuit's opinion in *United States v. Hicks* and the Tenth Circuit's opinions in *United States v. Rhodes* and *United States v. Pedrazza*. These cases illuminate the distinct approaches taken by the two circuits as to whether the Supreme Court's decision in *Booker* does or does not apply to sentence modification proceedings. Finally, Part IV analyzes the strengths and weaknesses of the Ninth and Tenth Circuit's differing approaches. Part IV concludes that the Tenth Circuit's holding more accurately captures the intent of Congress and the U.S. Sentencing Commission when promulgating the Federal Sentencing Guidelines, while also refraining from infringing on defendants' Sixth Amendment rights.

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10. *See id.*

11. United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000) (holding that "[a] motion pursuant to § 3582(c)(2) 'is not a do-over of an original sentencing proceeding'"); United States v. Cothran, 106 F.3d 1560, 1562 (11th Cir. 1997) (holding that "§ 3582(c)(2) . . . do[es] not contemplate a full *de novo* resentencing"); *see also* United States v. McBride, 283 F.3d 612, 615 (3rd Cir. 2002) (holding that § 3582(c)(2) does not constitute a full resentencing).

12. 18 U.S.C. § 3553 (2006).

13. *Id.* § 3553(a).

14. See United States v. Rhodes, 549 F.3d 833, 840 (10th Cir. 2008).

15. *See id.*

I. HISTORY OF THE FEDERAL SENTENCING GUIDELINES

In order to understand the implications of the decision in *Rhodes* and the preceding decision in *Booker*, a cursory understanding of the history of the Guidelines and the role they have played in criminal sentencing is necessary. The Guidelines were created in 1987, and shortly after their introduction, they became a mandatory and binding set of rules for federal judges.[16] Throughout the history of American jurisprudence, however, the concept of a mandatory sentencing scheme was never a *de facto* assumption. In fact, the opposite was true. Prior to 1987, judges were granted wide discretion in determining individual sentences because the philosophical underpinnings of punishment focused on the rehabilitation of offenders.[17] As a result, courts focused on individually tailored sentences designed to best assist each prisoner's rehabilitation.[18]

When the ideologies surrounding the purposes of punishment changed, however, a change in the nature of sentencing soon followed.[19] In 1984, Congress passed the Sentencing Reform Act ("SRA") in an attempt to check the discretion of federal judges in sentencing procedures.[20] The SRA established the United States Sentencing Commission, which in turn was charged with developing the Federal Sentencing Guidelines.[21] The Guidelines were passed in an effort "to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system."[22] Three specific goals of implementation were: "(1) '*honesty* in sentencing'; (2) '*uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders'; and (3) '*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.'"[23] Other provisions within the SRA effectively instituted the mandatory nature of the Guidelines.[24]

The Guidelines were designed to be structured and formulaic.[25] These characteristics are pertinent to the SRA's goals of honesty, uniformity, and proportionality, and they enable even-handed and methodi-

16. Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of* Gall, Kimbrough, *and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 118 (2008).

17. Daniel M. Levy, *Defending* Demaree*: The Ex Post Facto Clause's Lack of Control Over the Federal Sentencing Guidelines After* Booker, 77 FORDHAM L. REV. 2623, 2630 (2009).

18. *Id.*

19. *Id.* at 2630–31.

20. Exum, *supra* note 16, at 118.

21. Levy, *supra* note 17, at 2630–31.

22. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2007).

23. Exum, *supra* note 16, at 118 (citing U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2007)).

24. Levy, *supra* note 17, at 2632; *see also* 18 U.S.C. § 3553(b)(1) (2006).

25. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2007).

cal application of the rules to rein in judicial discretion.[26] When applying the federal sentencing rules, judges must follow a nine-step process in determining the appropriate sentence.[27] This process consists of: (1) determining the offense guideline applicable to the convicted offense; (2) determining the base offense level; (3) adjusting the base offense level by taking into account, among other considerations, the defendant's role in the offense or obstruction of justice; (4) repeating the previous steps for each convicted offense; (5) adjusting the base offense level for acceptance of responsibility; (6) determining the defendant's criminal history category; (7) determining the applicable guideline range that corresponds to both criminal history category and base offense level; (8) determining what options are available as regards probation, imprisonment, fines, supervision condition, and restitution for the applicable guideline range; and (9) consulting any policy statements, commentary, or language within the Guidelines that might influence the sentence to be given.[28]

Shortly after their introduction, the Guidelines had the "force of law."[29] However, this notion proved to be transitory, as the mandatory Guidelines would ultimately be declared unconstitutional in 2005 by the Supreme Court's decision in *Booker*.[30]

II. THE ROAD FROM *BOOKER* TO *RHODES*

The United States Supreme Court declared the Guidelines were advisory—not mandatory—in *United States v. Booker*.[31] This decision was the impetus for the question presented in the Tenth Circuit's decision in *Rhodes*, and will be discussed below at length. Following an explanation of the precedent established in *Booker*, this Comment discusses the differing approaches to applying *Booker* to sentence modification proceedings taken in *United States v. Hicks*,[32] *United States v. Rhodes*,[33] and *United States v. Pedraza*.[34] The Comment concludes with an analysis of the two disparate methods, and argues the Tenth Circuit's reasoning in *Rhodes* is more sound.

A. Booker *Background*

Appearing in the Western District of Wisconsin, Booker was charged with intent to distribute at least 50 grams of crack-cocaine.[35] The

26. *See* Exum, *supra* note 16, at 118.
27. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)–(i) (2007).
28. *Id.*
29. Levy, *supra* note 17, at 2632.
30. Exum, *supra* note 16, at 119–20.
31. *See* United States v. Booker, 543 U.S. 220, 244 (2005).
32. 472 F.3d 1167 (9th Cir. 2007).
33. 549 F.3d 833 (10th Cir. 2008).
34. 550 F.3d 1218 (10th Cir. 2008);
35. *Booker*, 543 U.S. at 227.

jury found him guilty of violating 21 U.S.C. § 841(a)(1)[36] after hearing evidence that he was in possession of 92.5 grams of crack-cocaine stored in a duffel bag.[37] At sentencing, the judge was required to take into consideration the policies and mandates of the Federal Sentencing Commission.[38] The judge determined that Booker's sentencing range fell between 210 and 262 months in prison, based on calculations that took into account the quantity of drugs the defendant was convicted of possessing and the defendant's prior criminal history.[39] In an act that would serve as the impetus for the appeal, the judge made additional findings of fact by a preponderance of the evidence, which enabled him to increase the defendant's sentencing range.[40] Under the new calculation, the judge determined that the defendant's sentencing range now fell between 360 months and life imprisonment. The judge sentenced Booker to thirty years (360 months) in prison, and Booker appealed.[41]

B. The Booker *Majority Opinions*

The threshold question presented in *Booker* was whether the mandatory application of the Guidelines violated a defendant's Sixth Amendment right to "a speedy and public trial, by an impartial jury."[42] In answering this inquiry, the Supreme Court first looked to its holding in *Apprendi v. New Jersey*.[43] In *Apprendi*, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[44] Based on this precedent, the *Booker* Court held that, because the district court judge increased Booker's sentence based upon findings not submitted to a jury nor proven beyond a reasonable doubt, the sentence violated the defendant's Sixth Amendment rights.[45]

The Court briefly discussed the history and theory behind sentencing policy, noting that explicit and definitive sentencing procedures had long been criticized—generally with pleas for broad judicial discretion.[46] Pursuant to the Federal Guidelines, judges were now called upon to im-

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36. The statutory language: "(a) Unlawful acts: Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally– (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1) (2006).

37. *Booker*, 543 U.S. at 227.

38. *Id.*

39. *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4) & 4A1.1 (2003).

40. *Booker*, 543 U.S. at 227. The judge individually determined in the post-trial hearing that the defendant Booker was guilty of distributing 566 grams of crack-cocaine (instead of the 92.5 grams determined by the jury) and obstructing justice. *Id.*

41. *Id.*

42. U.S. CONST. amend. VI; *Booker*, 543 U.S. at 229 n.1.

43. 530 U.S. 466 (2000).

44. *Id.* at 490. The statutory maximum is defined as the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Blakely v. Washington, 542 U.S. 296, 303 (2004).

45. *See Booker*, 543 U.S. at 227.

46. *Id.* at 236.

pose sentence enhancements upon statutory minimums with judicial findings that analyzed the defendant's conduct.[47] Provisions for individualized enhancement and tailoring of sentencing ranges "reflected growing . . . legislative concern about the proliferation and variety of drug crimes."[48] Yet, in *Booker*, the Court expressed its concern that this development was increasingly taking the power away from the jury, and in turn placing that power in the hands of individual public servants—federal judges.[49]

The *Booker* Court penned a total of five opinions in its decision, including two majority opinions each receiving a 5–4 vote. Delivering the opinion of the Court in part, Justice Stevens wrote that the Guidelines are subject to the jury trial requirements of the Sixth Amendment.[50] Building on the holding in *Apprendi*, Justice Stevens amplified the Court's position that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[51] As a result of this holding, the prior practice of increasing a defendant's sentence beyond the standard range, based upon independent judicial findings, was deemed unconstitutional.[52]

Justice Breyer delivered the remedial majority opinion and was forced to reconcile several competing interests: the Guidelines' institutional hold on the bench and bar, congressional and judicial desire to maintain uniformity and fairness in sentencing, and the newly unconstitutional status of a mandatory Guideline system.[53] Justice Breyer focused on congressional intent and asked what "Congress would have intended in light of the Court's constitutional holding."[54] The majority elected to sever and excise two provisions of the 1984 Sentencing Act because "engraft[ing] the Court's constitutional requirement onto the sentencing statutes . . . would destroy the system."[55] Eliminating provisions 18 U.S.C. § 3553(b)(1) and § 3742(e) eradicates the mandatory nature of the Guidelines in original sentencing, but still requires judges to *consider* the Guidelines and other sentencing goals contained within the 1984 Sentencing Act.[56] As a result, the Guidelines continue to provide some uniformity and predictability in sentencing, but at the same time, they equip

47. *See id.*
48. *Id.*
49. *Id.* at 237.
50. Exum, *supra* note 16, at 120.
51. *Booker*, 543 U.S. 220, 244 (2005).
52. *Id.* at 245.
53. *Id.* at 244–45.
54. *Id.* at 246 (internal quotation marks omitted).
55. *Id.* at 252.
56. *Id.* at 259; *see also* 18 U.S.C. §3553(a) (2003).

judges with the discretion to impose an increased sentence within the statutory range.[57]

Booker solidifies a defendant's constitutional right to have a jury establish, beyond a reasonable doubt, any fact that serves to increase a sentence. However, Justice Breyer's proposed remedy creates a paradox in itself. By excising the two provisions, federal sentencing judges are no longer *required* to impose a sentence dictated by the Guidelines, yet they are not *prohibited* from making additional findings of fact without the aid of the jury when sentencing defendants. Justice Stevens's majority opinion states that the constitutional issue raised would have been avoided if the Guidelines were advisory.[58] The problem confronted in *Booker* was whether the judicial fact-finding that served to increase a defendant's sentence beyond the statutory maximum was unconstitutional, but the remedy is simply more judicial discretion. "[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[59] Judges continue to make findings that serve to increase a defendant's sentence, so long as that discretion and fact finding effects a term within the customary range.

III. DOES *BOOKER* APPLY TO SENTENCE MODIFICATION PROCEEDINGS?

While the *Booker* Court made clear that mandatory sentencing guidelines were unconstitutional in *original* sentencing proceedings, the decision did not reach sentence *modification* proceedings. The Ninth Circuit was the first court to address the effect of *Booker* on sentence modification proceedings. The Tenth Circuit was next in line to address the issue and came to an opposite conclusion, creating a split with its sister circuit. Since that time, eight of the nine remaining circuit courts have confronted the issue, and all have followed the rationale put forth by the Tenth Circuit. These decisions strengthen the Tenth Circuit's justification for creating a split with the Ninth Circuit, but the divergent view of the Ninth still remains unreconciled with the majority.

A. The Ninth Circuit's Interpretation in United States v. Hicks

1. *Hicks* Background

In a matter of first impression, the Ninth Circuit in *United States v. Hicks* overturned the district court's decision and held that *Booker* applied to sentence modification proceeding under 18 U.S.C. § 3582(c)(2).[60] The facts in *Hicks* are very similar to those in *Booker*. The defendant was convicted for conspiring to distribute crack-cocaine,

57. *Booker*, 543 U.S. at 246.
58. *Id.* at 233.
59. *Id.*
60. United States v. Hicks, 472 F.3d 1167, 1168 (9th Cir. 2007).

enabling drug trafficking, and carrying a firearm in connection with the underlying crimes.[61] The court analyzed the offenses under the Guidelines and imposed a sentence of 420 months in prison.[62]

However, this sentence was not the final word for Hicks. On November 1, 2000, the U.S. Sentencing Commission promulgated Amendment 599, which eliminated any sentence enhancement for possessing, brandishing, using, or discharging an explosive or firearm in conjunction with the underlying offense.[63] This amendment applied directly to Hicks's case, because the judge had considered Hicks's use of a firearm in connection with the underlying offenses to increase his sentence over the statutory maximum.[64] Under the new amendment, Hicks's two-point enhancement for possession of a firearm while trafficking drugs was no longer valid.[65]

Interestingly, Hicks moved to modify his sentence based on Amendment 599 *after* the Supreme Court rendered its decision in *Booker*.[66] The defendant argued that the court should apply *Booker* to § 3582(c)(2) resentencing proceedings, which would allow judicial discretion to impose a sentence below the range set forth in the Federal Guidelines.[67] The district court rejected this argument, but that ruling would change on appeal.[68]

2. *Hicks* and the Applicability of *Booker* to § 3582(c)(2) in the Ninth Circuit

Modification of a sentence pursuant to § 3582(c)(2) allows for a downward adjustment if the Federal Sentencing Commission alters relevant Guidelines.[69] The question that naturally followed was whether the modified range adopted by the Sentencing Commission is mandatory or

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61. *Id.*

62. *Id.*

63. U.S. SENTENCING GUIDELINES MANUAL app. C (2000) ("If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3"); U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2 (2000).

64. *Hicks*, 472 F.3d at 1168.

65. *Id.* at 1169.

66. *Id.*

67. *Id.*

68. *Id.* at 1168–69.

69. *Id.* at 1170. Pertinent statutory language:

> 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 a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2) (2006).

advisory in *Booker*'s wake. In *Hicks*, the Ninth Circuit held that *Booker* rendered the Guidelines advisory in every context, which by default would include sentence modification proceedings.[70]

After finding that the factors specified in § 3553(a) justify a modification of the sentence,[71] a court must also ensure a modification would be consistent with any applicable policies of the Federal Sentencing Commission.[72] However, as the *Booker* holding is a constitutional rule, the court clarified that the applicability of the *Booker* holding to sentence modification would ultimately trump any policy statement should an inconsistency arise between the two.[73] Nonetheless, the Ninth Circuit continued its policy analysis to see if it could find common ground between the two.

The policy set forth in § 1B1.10(b) of the Guidelines reads: "In determining . . . a reduction in the term of imprisonment . . . 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." [74] The Ninth Circuit's decision reconciles this language with its ultimate conclusion that *Booker* applies to modification proceedings through its interpretation of the word "should." As the language of § 1B1.10(b) is not mandatory, the court reasoned that in a sentence modification proceeding the judge is not bound by the sentence he would have imposed had the amendment been in effect at the time, but should feel free to go below the applicable guideline.[75]

B. The Tenth Circuit Weighs in with United States v. Rhodes

1. *Rhodes* Background

On December 5, 2008, the Tenth Circuit weighed in with its interpretation of whether *Booker* applied to sentence modification proceed-

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70. *Hicks*, 472 F.3d at 1172.

71. The pertinent statutory language reads:

> (a) 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 . . . ; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established . . . ; (5) any pertinent policy statement . . . ; (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. 3553(a) (2006).

72. *Hicks*, 472 F.3d at 1172.

73. *Id.*

74. *Id.* (emphasis added).

75. *Id.*

ings pursuant to § 3582(c)(2).[76] The posture of the case was similar to both *Booker* and *Hicks* in that the appeal came before the court for a modified sentence after the Sentencing Commission amended the Guidelines.[77] Here, the defendant Theomas Rhodes was convicted and sentenced for his involvement in a conspiracy to distribute crack-cocaine.[78] Similar to Hicks, this sentence modification occurred in the new post-*Booker* ambit of sentencing, and therefore the defendant requested that the sentencing judge consider the new modified sentencing range as advisory, rather than mandatory.[79]

When determining the initial sentence, the district court analyzed the various metrics and ranges imposed by the Guidelines (pre-*Booker*) and found Rhodes's sentencing range to fall between 210 to 262 months, finally sentencing him to 210 months in prison.[80] However, just as the defendant in *Hicks* requested a sentence modification based on Amendment 599, Rhodes sought a § 3582(c)(2) modification pursuant to Amendments 706, 712, and 713.[81] Amendment 706 granted a two-level reduction from the base offense for crack-cocaine offenses, and 712 and 713 allowed the 706 Amendment to apply retroactively.[82] The combination of these amendments resulted in a potential lowering of Rhodes's sentence.[83] In a pro se motion, Rhodes asked the judge to impose a sentence at the low end of the new range, which was lowered by amendment 706, because his original sentence had been at the low end of the sentencing range imposed before the amendment.[84] However, after the court appointed counsel for Rhodes, the motion was modified.[85] Rhodes then asked that the court impose a sentence of 168 months or less, with 168 months being the lowest minimum sentence available under the modified sentencing guidelines.[86] The defendant based this request on consideration of his exemplary post-conviction behavior and personal initiative to obtain an education while incarcerated.[87] Ultimately the judge sentenced Rhodes to 168 months in prison, which was the lowest possible sentence that remained within the Federal Guidelines' range.[88]

76. United States v. Rhodes, 549 F.3d 833, 841 (10th Cir. 2008).
77. *Id.* at 834.
78. *Id.*
79. *Id.* at 836.
80. *Id.* at 835.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 836.
86. *Id.*
87. *Id.*
88. *Id.* at 837.

2. The *Rhodes* Appeal

In rendering the sentence, the judge indicated that he was required to "go back to what [he] would have given him, had [the current sentencing guidelines] been in effect then," indicating that post-conviction behavior was irrelevant to the process.[89] On appeal, Rhodes questioned the validity of this ruling.[90] He also appealed the district court's holding that "it lacked the authority to impose a sentence below the amended guideline range.[91]

In analyzing the question presented, the Tenth Circuit looked to the policy statement in § 1B1.10 issued by the Sentencing Commission—just as the Ninth Circuit had done in *Hicks*—because any sentence modification pursuant to § 3582(c)(2) must satisfy both the § 3553(a) factors and applicable policy statements.[92] However, in the interim between the decision in *Hicks* and the appeal in *Rhodes*, the Sentencing Commission altered some of the language of § 1B1.10, limiting judicial discretion on sentence modification proceedings.[93] In pertinent part, policy statement § 1B1.10 reads as follows:

> (2) Limitations and Prohibition on Extent of Reduction.
>
> (A) In General.
>
> Except as provided in subdivision (B), 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.[94]

On appeal, Rhodes argued § 1B1.10 construed the Guidelines as mandatory, an outcome that would conflict with the holding in *Booker*.[95] The Court quickly dismissed this argument, finding that proceedings pursuant to § 3852 do not constitute full resentencings.[96] Thus, the Court rejected the Ninth Circuit's antecedent analysis in *Hicks*.[97]

The Tenth Circuit's argument can be broken down into two steps. First, *Booker* only applies to original sentencing proceedings, because the Sixth Amendment concerns that rendered the Guidelines advisory are not implicated in situations involving sentence modification.[98] Second,

89. *Id.* at 836.
90. *Id.* at 834.
91. *Id.*
92. *See id.* at 840.
93. United States v. Pedraza, 550 F.3d 1218, 1221 (10th Cir. 2008).
94. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2)(A) (2008).
95. *Rhodes*, 549 F.3d at 839.
96. *Id.* at 839–40.
97. *Id.* at 841.
98. *Id.* at 839–40.

sentence modification proceedings are distinguished from original sentence proceedings because different statutes govern them.[99]

Original sentencing proceedings are guided by 18 U.S.C. § 3553, and require the court to make numerous determinations based on the parameters set forth in the Sentencing Guidelines.[100] However, a modification proceeding is "a different animal," as it is much more limited in scope.[101] In a sentence modification pursuant to § 3582(c)(2), if a court decides to revise a sentence, the only permissible action is a decrease in term.[102] A judge has no authority to increase the sentence after it has been imposed.[103] The judge does not make additional findings of fact to increase the defendant's sentence, which was the main Sixth Amendment concern rectified by the *Booker* decision.[104] In *Booker*, the Court only excised the part of the statute that made the Guidelines mandatory in *original* sentencing proceedings—the Supreme Court was silent on how the Federal Guidelines would apply to sentence *modifications*.[105] Ultimately, *Rhodes* reinforced the continuing mandatory nature of the Guidelines when conducting a sentence modification proceeding in the Tenth Circuit.

C. The Tenth Circuit Remains Consistent in Pedraza

1. *Pedraza* Background

Less than one month after *Rhodes*, the Tenth Circuit was presented with a similar situation in the case of defendant Enrique Pedraza.[106] Pedraza was convicted and sentenced in a drug smuggling conspiracy involving transportation of 700 kilograms of cocaine from Columbia to the United States.[107] Under the Guidelines, Pedraza's baseline offense level was 40, resulting in an initial sentence of 384 months.[108] Approximately two and a half years after Pedraza was sentenced, the Sentencing Commission passed Amendment 505, which limited the upper level for all drug sentences to 38 (applied retroactively via Amendment 536).[109] This new Amendment would decrease Pedraza's sentence from a range of 360 months to life, to 292 months to 365 months.[110] The district court judge

99. *Id.* at 840.
100. *Id.*
101. United States v. Torres, 99 F.3d 360, 362 (10th Cir. 1996).
102. *See* 18 U.S.C. § 3582(b)–(c) (2006).
103. *See id.*
104. *Rhodes*, 549 F.3d at 840.
105. *Id.*
106. United States v. Pedraza, 550 F.3d 1218, 1219 (10th Cir. 2008).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

imposed a sentence of 292 months, the lowest sentence possible under the guidelines.[111]

2. *Pedraza* Majority

Like Rhodes, Pedraza appealed his sentence. Pedraza claimed that the Guidelines were only advisory after *Booker*, and the judge had discretion to further decrease the sentence.[112] The court rejected this argument, citing its holding in *Rhodes* and explaining that *Booker* does not apply to sentence modification proceedings pursuant to § 3582(c)(2) because sentence modifications are a separate process, distinct from initial sentencing.[113]

The court was also required to determine if § 3582(c)(2), in and of itself, vested judges with the discretion to grant variances below the recommended guideline range on sentence modifications. Although the court definitively held that *Booker* was inapplicable in sentence modifications, it recognized that a "judge's resentencing authority is a creation of statute."[114] Therefore, if § 3582(c)(2) authorized a judge's discretion to impose below Guidelines modifications, it would be valid.[115] The Sentencing Commission is the entity that determines the scope of a judge's authority under § 3582(c)(2)—a power vested in the Commission by statute.[116] To determine the extent of the judge's power in sentence modifications, the court needed to analyze the Commission's applicable policy statement § 1B1.10.[117]

Although Rhodes's appeal was decided first, Pedraza's initial resentencing proceeding occurred eight months before Rhodes's initial resentencing.[118] In the interim between these two hearings, the Sentencing Commission changed the policy language of § 1B1.10.[119] In pertinent part, the policy as applied to Pedraza, stated that "*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.*"[120] This language does not indicate that a sentence modification should be treated in the same manner as an initial sentencing.[121] Therefore, the majority found the amended language to be consistent with its holding in *Rhodes* and followed its precedent

111. *Id.* at 1220.
112. *See id.*
113. *Id.*
114. *Id.*
115. *See id.*
116. *Id.*
117. *Id.* at 1221.
118. *Id.*
119. *Id.*
120. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b) (2006) (emphasis added).
121. *Pedraza*, 550 F.3d at 1221.

holding that *Booker* did not apply to sentence modification proceedings pursuant to § 3582(c)(2).[122]

3. *Pedraza* Dissent

In an opinion that afforded the court's "learned colleagues on the Ninth Circuit" a great amount of deference, the dissent focused on the change in policy language of § 1B1.10(b)(2) between *Pedraza* and *Rhodes*.[123] Although § 1B1.10 did not specifically articulate that a sentence modification was equivalent to an initial sentencing, the dissenting judge preferred to invoke the "rule of lenity" in Pedraza's situation.[124] This rule of judicial construction provides that when ambiguity exists in a criminal statute relating to prohibition and penalties, such ambiguities are resolved in favor of the defendant when not contrary to legislative intent.[125] Because § 1B1.10 does not explicitly address the question presented, the dissent would choose to allow for modification below the recommended guidelines and follow the precedent of the Ninth Circuit by applying the rule of lenity.[126]

IV. WHY THE TENTH CIRCUIT GOT IT RIGHT

A. *Weaknesses of the Ninth Circuit Interpretation in* Hicks

In justifying its holding in *Hicks*, the Ninth Circuit asserted that "*Booker* abolished the mandatory application of the Sentencing Guidelines in all contexts."[127] This oversimplifies the issue. The catalyst behind the *Booker* decision was the Sixth Amendment concern that arose when federal judges increased sentences beyond the standard range based upon judicial fact finding.[128] Although this was common practice in sentencing procedures at the time, *Booker* held the practice to be unconstitutional.[129]

These same concerns do not arise in the context of a sentence modification proceeding. First and foremost, a sentence modification proceeding can only *lower* an individual's sentence; it cannot enhance a sentence. In *Apprendi*, and consequently in *Booker*, the United States Supreme Court was concerned only with a "fact that *increases* the penalty for a crime beyond the prescribed statutory maximum," as the Sixth Amendment requires such facts must be submitted to the jury and proven beyond a reasonable doubt.[130] The individual protections contained within the Sixth Amendment do not apply to situations where the government

122. *Id.* at 1222.
123. *Id.* (McKay, J., dissenting).
124. *Id.*
125. BLACK'S LAW DICTIONARY 1359 (8th ed. 2004).
126. *Pedraza*, 550 F.3d at 1223 (McKay, J., dissenting).
127. United States v. Hicks, 472 F.3d 1167, 1169 (9th Cir. 2007).
128. United States v. Booker, 543 U.S. 220, 229 n.1 (2005).
129. *See id.* at 244.
130. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

does not erode an individual's liberty, but in fact only decreases a person's sentencing exposure, as is the case in sentence modification proceedings.

Furthermore, the Ninth Circuit construes sentence modification procedures to be the equivalent of an initial sentencing procedure.[131] Yet, even as it advanced this argument the court recognized that a sentence modification truly is a different procedure, by conceding that a resentencing is "limited in certain respects."[132] The most critical difference is that a modification does not call into question the Sixth Amendment concern that was the underpinning of the *Booker* decision. It is impossible in such a proceeding for judicial fact finding to increase a defendant's sentence.

Congress created the U.S. Sentencing Commission with the intent that the Commission would create a set of guidelines to regulate sentencing procedures to ensure consistency and fairness in sentencing.[133] Throughout the decision in *Booker*, the Supreme Court consistently reiterated that Congress intended to create a mandatory sentencing scheme, despite the ultimate holding that federal district judges are no longer bound by the ranges prescribed by the guidelines in original sentencing proceedings.[134]

To determine the Commission's intent, the *Hicks* court looked to the policy language set forth in § 1B1.10 because § 3582(c)(2) allows for a sentence modification only after consulting the § 3553(a) factors and complying with existing policy statements.[135] The court reasoned the policy statements do not address the threshold question of whether the *Booker* holding is applicable to sentence modification proceedings, which is foreseeable as the statements were published before the Court decided *Booker*.[136] The Ninth Circuit concluded the language of the policy statement does not prohibit the application of the Guidelines in sentence modifications in an advisory manner.[137]

It is true that the policy language is not explicit on this point, failing to give either an affirmative or negative answer. However, considering the totality of the circumstances, it seems evident that Congress and the U.S. Sentencing Commission intended to create a mandatory and binding set of guidelines.[138] It is clear that this is no longer possible in the context of initial sentencing, but in a modification procedure, where the *Booker* Sixth Amendment concern is not present, courts would do well to look

131. *Hicks*, 472 F.3d at 1171.
132. *Id.*
133. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2000).
134. United States v. Booker, 543 U.S. 220 *passim* (2005).
135. *Hicks*, 472 F.3d at 1172.
136. *Id.*
137. *Id.*
138. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2000).

back to the original purpose and legislative intent underlying the Guidelines. Justice Breyer's majority opinion in *Booker* concludes that Congress and the Commission would have desired that the Guidelines be stripped of their mandatory nature in the least invasive way possible.[139] If the mandatory nature of the Guidelines fails to raise any constitutional concerns in the context of modification, there is no reason to render them advisory.

B. The Tenth Circuit Breaks Rank in Rhodes

First in *Rhodes* and then in *Pedraza*, the Tenth Circuit had two distinct opportunities to decide whether the Guidelines were mandatory or advisory as applied to sentence modification proceedings. The Tenth Circuit was fortunate to decide *Rhodes* prior to *Pedraza*. This sequencing proved fortuitous because the U.S Sentencing Commission revised its policy language in the wake of the *Hicks* decision in order to directly address the issue presented in that case.[140] Now, § 1B1.10 specifically states that the court shall not reduce the defendant's term of imprisonment, pursuant to § 3582(c)(2), to a length that is less than the minimum of the amended guideline range.[141] Originally, the Ninth Circuit relied on the textual ambiguity to reconcile the text with the seemingly inconsistent holding that *Booker* applied to sentence modification. The change in § 1B1.10's policy language evidenced the U.S. Sentencing Commission's intent to maintain mandatory guidelines during sentence modification. The Tenth Circuit correctly retained the binding nature of the Guidelines in sentence modification proceedings by concluding that *Booker* does not apply in the modification context and thus complying with newly amended policy language.

Soon after the decision in *Rhodes*, the court decided *Pedraza*.[142] Pedraza's resentencing occurred before the change in policy language that was discussed in *Rhodes*. As a result, the same § 1B1.10 policy language that applied in *Hicks* governed Pedraza's sentencing modification.[143] The Tenth Circuit, however, did not retreat to the rationale of the Ninth Circuit. Rather, the Court looked at § 1B1.10's application notes, the Guidelines as a whole, and the legislature's intent in creating guidelines, to conclude that § 3582(c)(2) and the "applicable commentary strongly suggest that the resentencing judge's discretion extends to substituting the new guideline range for the old guideline range but goes no further."[144]

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139. *Booker*, 543 U.S. at 265.
140. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(1) (2008).
141. *Id.* § 1B1.10(b)(2)(A).
142. United States v. Pedraza, 550 F.3d 1218 (10th Cir. 2008).
143. *Id.* at 1221.
144. *Id.*

Sentence modifications can only lower a defendant's sentence. The concerns giving rise to *Booker*'s constitutional rule are not present in modification proceedings. Furthermore, the Commission's change in policy language solidifies its intent that § 3582(c)(2), in and of itself, does not authorize an advisory Guideline scheme in the context of modification. Rather, the Guidelines should retain their mandatory status.

In the time since the Tenth Circuit decided *Rhodes* and *Pedraza*, eight circuits—the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Eleventh—have addressed the issue of whether *Booker* applies to sentence modification proceedings.[145] In all instances, the circuit courts correctly held that *Booker* does *not* affect § 3582(c)(2) modification proceedings.[146] Thus, while the Ninth Circuit's opinion in *Hicks* remains at odds with the decisions in other circuits, the current trend clearly supports the Tenth Circuit's reasoning in *Rhodes* and *Pedraza*. Although the Guidelines lost some of their bite after *Booker*, the decision in *Rhodes* reinstates their importance in maintaining a system of federal criminal sentencing that is fair, consistent, and uniformly applied.

CONCLUSION

While the merits of greater judicial discretion or bright line sentencing rules can be debated, the U.S. Sentencing Commission, authorized by Congress, has determined that mandatory guidelines are preferable. Although no longer mandatory in initial proceedings, the Guidelines continue to exert significant influence on initial sentencing and have proven to retain their binding authority in the majority of Circuits addressing the Guidelines' role in sentence modification proceedings. Even if applied in an advisory manner, the Guidelines will continue to influence federal judges in sentencing procedures, but will do so without infringing on defendants' Sixth Amendment rights.

While the Tenth Circuit was the first court to create a split with the Ninth Circuit on this issue, recent decisions in other circuits have coalesced behind the rationale of *Rhodes*.[147] Whether the Supreme Court will grant certiorari to unify the circuits remains to be seen. As it stands now, however, the circuit split directly undermines the Sentencing Commission's goals of consistency, honesty, and fairness in sentencing, as the Guidelines are not being applied uniformly across the circuits.

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145. *See* United States v. Fanfan, 558 F.3d 105, 106 (1st Cir. 2009); United States v. Savoy, 567 F.3d 71, 72 (2d Cir. 2009); United States v. Doe, 564 F.3d 305, 307 (3d Cir. 2009); United States v. Dunphy, 551 F.3d 247, 250 (4th Cir. 2009); United States v. Doublin, 572 F.3d 235, 238 (5th Cir. 2009); United States v. Cunningham, 554 F.3d 703, 704 (7th Cir. 2009); United States v. Starks, 551 F.3d 839, 840–41 (8th Cir. 2009); United States v. Melvin, 556 F.3d 1190, 1190 (11th Cir. 2009).

146. *See Fanfan*, 558 F.3d at 106; *Savoy*, 567 F.3d at 73; *Doe*, 564 F.3d 305, 314; *Dunphy*, 551 F.3d at 252; *Doublin*, 572 F.3d at 238; *Cunningham*, 554 F.3d 703, 709; *Starks*, 551 F.3d at 842–43; *Melvin*, 556 F.3d at 1190.

147. *See, e.g.*, *Starks*, 551 F.3d at 842–43; *Dunphy*, 551 F.3d at 252.

Whether through Supreme Court action or through a change in the Ninth Circuit's position on the issue, one thing remains clear: the resulting inconsistency in sentence modifications requires prompt resolution.

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