No. 09-10245

IN THE

Supreme Court of the United States

WILLIAM FREEMAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2), based on a Guidelines sentencing range that has been subsequently lowered and made retroactive by the Sentencing Commission, solely because the district court accepted a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C).

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The opinion of the United States Court of Appeals for the Sixth Circuit and its denial of rehearing *en banc* are reprinted in the Joint Appendix at J.A. 70a-94a. The opinion and order of the district court denying petitioner's motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2), is reprinted in J.A. 66a-69a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit rendered its opinion on November 20, 2009, and denied the petition for rehearing *en banc* on January 12, 2010. J.A. 70a-94a. The petition for a writ of certiorari was filed on April 7, 2010, and was granted on September 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

The relevant statutory provision, 18 U.S.C. § 3582(c), and other provisions, Federal Rule of Criminal Procedure 11(c) and (d) and USSG § 1B1.10(c), are reprinted in an appendix to this brief.

STATEMENT OF THE CASE

In 2005, William Freeman pled guilty to offenses involving crack cocaine, marijuana, and a firearm, and was sentenced to 106 months. Mr. Freeman pled guilty to all of the charges filed against him pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) (hereinafter "C plea agreement"). J.A. 34a-35a. According to the explicit terms of the plea agreement, Mr.

Freeman agreed that his sentence would be determined pursuant to the United States Sentencing Guidelines (USSG), and the parties agreed to a sentence at the bottom of the guideline range by calculating the guideline range, consisting of 46-57 months for the crack cocaine offense and 60 consecutive months for the firearm offense. J.A. 25a-28a. The parties also agreed that the district court would independently calculate the guideline range. The court did so, reaching an identical guideline range, and imposed the agreed-upon sentence of 106 months at the bottom of that range. J.A. 28a, 47a-48a, 56a.

Thereafter, the United States Sentencing Commission reduced the base offense levels for crack cocaine offenses by two levels and made the amendment retroactive. *See* USSG App. C, amend. 706 (Nov. 1, 2007); *id.* amend. 713 (Mar. 3, 2008). Mr. Freeman moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). The district court ruled that Mr. Freeman was ineligible for a sentence reduction under § 3582(c)(2) because Sixth Circuit law prohibited a reduction when the defendant had entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). A panel of the Sixth Circuit affirmed, relying on circuit precedent, with one judge concurring but strongly disagreeing with that precedent. This case presents the issue of whether a defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) solely because the district court accepted a plea agreement under Rule 11(c)(1)(C).

1. On September 14, 2004, a Louisville, Kentucky police officer responded to a call that a robbery suspect had been identified at a liquor store. At the store, the officer recognized William Freeman from the description

of the suspect. The officer asked to speak with Mr. Freeman and told him to put his hands on a vehicle. Mr. Freeman refused and attempted to flee on foot. The two men scuffled, another officer arrived, and Mr. Freeman was subdued. When the officers brought Mr. Freeman to his feet, they found a loaded pistol and a bag containing what turned out to be 1.6 grams of marijuana on the ground where he had been lying. During a search incident to arrest, the officers found what turned out to be 3.42 grams of crack cocaine in Mr. Freeman's pants pocket. J.A. 21a-22a.

2. A superseding indictment charged Mr. Freeman with possession with intent to distribute 3.4 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(C) (Count 1); possession of 1.6 grams of marijuana, a misdemeanor in violation of 21 U.S.C. § 844 (Count 2); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2) (Count 4). J.A. 12a-19a. The superseding indictment charged the same four counts as the original indictment; the only difference between the original and superseding indictments was that the latter stated the quantity of drugs. J.A. 12a-19a.

3. The parties entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) under which Mr. Freeman agreed to plead guilty to all charges against him. J.A. 21a. The plea agreement provided that the government would (1) "agree that a sentence of 106 months' incarceration is the appropriate disposition of this case;" (2) recommend a reduction of three levels for

"acceptance of responsibility" under USSG § 3E1.1(a) and (b); (3) stipulate that the total quantity of drugs was 3.4 grams of a mixture or substance containing cocaine base and 1.6 grams of marijuana; (4) recommend a fine at the lowest end of the applicable guideline range; and (5) demand forfeiture of the firearm. J.A. 25a-27a.

Mr. Freeman agreed "to have his sentence determined pursuant to the Sentencing Guidelines." J.A. 28a. Paragraph 11A of the plea agreement stated:

> Both parties have independently reviewed the Sentencing Guidelines applicable in this case, and in their best judgment and belief, conclude as follows:
>
> A. The Applicable Offense Level should be determined as follows:

Base offense level:	22	USSG § 2D1.1 (drug quantity table)
	-3	USSG § 3El.1(a) & (b).
Adjusted offense level	19	

J.A. 27a. Paragraph 11A further stated that the § 924(c) charge carried a term of 60 months' imprisonment that would run consecutively to any sentence imposed on the drug charges. J.A. 27a. Paragraph 11B stated that the parties anticipated a criminal history category of IV, but agreed that criminal history would be determined

upon completion of the Presentence Investigation Report (PSR), and reserved the right to object to the calculation of criminal history and to seek a departure from the criminal history category. J.A. 27a-28a. Otherwise, Mr. Freeman agreed that he would "not oppose imposition of a sentence incorporating the disposition provided for within [the] Agreement, nor argue for any other sentence." J.A. 32a.

The parties agreed that the "statements of applicability of sections of the Sentencing Guidelines and the statement of facts" set forth in the agreement "are not binding upon the Court," and that "the Court will independently calculate the Guidelines at sentencing." J.A. 28a. The agreement stated that Mr. Freeman "may not withdraw the plea of guilty solely because the Court does not agree with either the statement of facts or Sentencing Guideline application," and also that if the court "refuses to accept" the agreement, "the defendant will be allowed to withdraw the plea of guilty." J.A. 28a, 31a.

In addition to his trial rights, Mr. Freeman waived his rights to directly appeal, and to "contest or collaterally attack" his conviction and resulting sentence. J.A. 28a. He did not waive his right to move for a sentence reduction under 18 U.S.C. § 3582(c)(2). The agreement contained an integration clause, stating that it was "the complete and only Agreement," and was "binding only on the parties to the Agreement." J.A. 32a.

On April 18, 2005, the district court accepted the guilty plea. J.A. 34a-35a. The Probation Office then prepared a PSR in which it calculated a total offense level of 19 and a criminal history category of IV. Thus,

the guideline range was 46-57 months followed by a mandatory consecutive sentence of 60 months on the § 924(c) charge.[1] J.A. 111a-113a, 128a, 134a.

4. At sentencing on July 18, 2005, defense counsel stated that the parties had agreed to a sentence of 106 months under a C plea agreement, that the agreed-upon sentence was within the advisory guideline range calculated by the probation officer, and requested that the court accept the plea agreement. The court responded: "Very well. The Court will adopt the findings of the probation officer disclosed in the probation report and application of the guidelines as set out therein." J.A. 47a. The court reviewed the Guidelines calculation on the record, imposed a sentence of 106 months' imprisonment (consisting of 46 months on Counts 1 and 4, a concurrent sentence of 12 months on Count 2, and a consecutive sentence of 60 months on Count 3), and noted that "the sentence imposed . . . fall[s] within the guideline range[ ] and [is] sufficient to meet the objectives of the law." J.A. 49a.

5. In June 2008, following the Sentencing Commission's retroactive two-level reduction of the base offense levels for crack cocaine offenses, *see* USSG App. C, amend. 706 (Nov. 1, 2007); *id.* amend. 713 (Mar. 3, 2008), the district court appointed counsel to represent Mr. Freeman in

[1] Counts 1 and 4 were grouped for Guideline computation purposes, J.A. 110a-113a, and the higher offense level for Count 1 applied, *see* USSG § 3D1.3(a). No enhancement was added to the offense level for Count 1 for the firearm under USSG § 2D1.1(b)(1) because of the 60-month consecutive sentence on Count 3. *See* USSG § 2K2.4, comment. (n.4). The 1.6 grams of marijuana involved in Count 2 had no effect on the guideline range.

filing a motion for reduction in sentence under 18 U.S.C. § 3582(c)(2). The court also ordered the Probation Office to file a Memorandum of Recalculation (MOR) under seal. J.A. 60a-62a.

The MOR calculated Mr. Freeman's amended guideline range, which lowered the total offense level from 19 to 17, and resulted in a range of 37-46 months reduced from 46-57 months. J.A. 142a-143a. The MOR noted that the parties had entered into a Rule 11(c)(1)(C) plea agreement with an agreed-upon sentence of 106 months, and that the court had adopted the PSR and its guideline applications and imposed a sentence of 106 months. J.A. 141a. The MOR recommended that the district court enter an amended judgment for a reduced sentence of 37 months within the amended range as to Counts 1 and 4, to be served concurrently with 12 months on Count 2 and followed by the 60 months on Count 3, for a total term of imprisonment of 97 months. J.A. 144a.

The government did not object to the MOR. The court, however, subsequently determined that Sixth Circuit case law prohibited the court from revisiting the sentence, and ordered the Probation Office to file an amended MOR. J.A. 63a-65a. The amended MOR reiterated the previous Guidelines calculation, but now stated that no reduction was authorized because the original sentence was imposed under the terms of a binding Rule 11(c)(1)(C) agreement. J.A. 148a-151a.

Defense counsel objected to the amended MOR, arguing that Rule 11(c)(1)(C) did not preclude Mr. Freeman from receiving the two-level reduction authorized by Amendment 706 because the parties

had used the applicable Guidelines to determine the agreed-upon sentence, and the district court had relied on those Guidelines to accept the plea agreement. J.A. 153a. Counsel argued that the Sixth Circuit's decision in *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004), was premised on the "dubious assertion" that a sentence agreed upon in a Rule 11(c)(1)(C) plea agreement was not calculated under the Guidelines but was determined by the agreement. J.A. 158a.

The government responded that under *Peveler*, the district court was "without authority to modify [Mr. Freeman's] sentence." J.A. 162a. The district court denied Mr. Freeman's motion because, although "not completely persuaded" by *Peveler*'s "position" that "retroactive amendments to the Sentencing Guidelines provide legally insufficient basis on which to modify a sentence under a Rule 11 C Plea," *Peveler* was "the prevailing law in the Sixth Circuit," and thus "the court cannot reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706." J.A. 68a-69a.

5. The Sixth Circuit affirmed because "[i]n *Peveler*, we held that the language of Rule 11(c)(1)(C) generally precludes a court from amending a sentence imposed pursuant to a plea under that provision, regardless of any subsequent change to the Guideline underlying the plea agreement." *United States v. Goins*, 355 Fed. Appx. 1, *3 (6th Cir. 2010), J.A. 73a. The Sixth Circuit recognized an exception to *Peveler*'s general prohibition "where resentencing is necessary to avoid a miscarriage of justice," but ruled that Mr. Freeman did not fall within that exception because – although the district court did not indicate that Mr. Freeman's original sentence

was appropriate and indeed "felt constrained to deny Freeman's motion" – the sentence "fell at the bottom of the range before the amendment and at the top of the range after the amendment, a situation that the *Peveler* court contemplated and determined did not overcome the general prohibition on resentencing." J.A. 75a.

6. In a concurring opinion, Judge White agreed that affirmance was "mandated" by *Peveler*, but believed that "*Peveler* construes 18 U.S.C. § 3582(c)(2) more narrowly than Congress intended." *Goins*, 355 Fed. Appx. at *4 (6th Cir. 2010) (White, J., concurring), J.A. 76a. Judge White explained that "[n]othing in the statute or policy statements supports the conclusion that Congress intended to exclude sentences that were based on the Guidelines, but imposed pursuant to Rule 11(c)(1)(C) plea agreements." J.A. 83a. She observed that "[g]iven that Rule 11(c)(1)(C) sentences are negotiated in the context of the same Guidelines as non-negotiated sentences, and are affected by the same Guidelines later rejected and amended by the Commission, there is no reason to believe Congress intended to single these sentences out and deny § 3582(c)(2) relief to defendants who pleaded guilty pursuant to Rule 11(c)(1)(C) agreements." J.A. 83a. Judge White reasoned that district courts are "certainly capable of . . . identifying those Rule 11(c)(1)(C) sentences that were based on Guideline ranges that were subsequently modified, and those that were not." J.A. 88a. "Were it not for *Peveler*," Judge White would have remanded Mr. Freeman's case "with instructions to determine whether the original sentence was based on the Guidelines and, if so, to consider whether a reduced sentence is appropriate." J.A. 92a.

SUMMARY OF ARGUMENT

18 U.S.C. § 3582(c)(2) authorizes a district court to consider whether to reduce a previously imposed term of imprisonment that was "based on" a guideline sentencing range that the Sentencing Commission has subsequently lowered and made retroactive. The Sentencing Commission retroactively lowered the guideline range applicable to Mr. Freeman's crack cocaine offense from 46-57 months to 37-46 months, and made the amendment retroactive. Under the common and ordinary meaning of the term "based on," Mr. Freeman's term of imprisonment was "based on" that range. The term of imprisonment was in fact at the bottom of the correctly calculated guideline range. The parties entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), which stated that Mr. Freeman "agrees to have his sentence determined pursuant to the Sentencing Guidelines," and set forth a correct calculation of the guideline range and an agreed-upon sentence at the bottom of that range. The probation officer independently calculated the same guideline range. The court adopted the probation officer's findings and application of the Guidelines, and imposed a sentence at the bottom of the guideline range. According to the plain words of § 3582(c)(2) and all of the record evidence, Mr. Freeman's term of imprisonment was "based on" a retroactively lowered guideline range.

The district court reluctantly denied Mr. Freeman's motion for relief under § 3582(c)(2), and the Sixth Circuit affirmed. Neither ruling was based on the language of § 3582(c)(2) or the facts of this case, but on circuit precedent holding that absent an agreement reserving the right to such relief, Rule 11(c)(1)(C) itself prohibits a

district court from considering a motion under § 3582(c)(2), notwithstanding the retroactive reduction of a relevant guideline that was used to determine the defendant's term of imprisonment.

This Court should reject the Sixth Circuit's categorical ban on § 3582(c)(2) sentence reductions in cases in which defendants entered into C plea agreements. The Sixth Circuit erred by ignoring the plain language of § 3582(c)(2), which requires only that the term of imprisonment was "based on" a retroactively lowered guideline range and contains no exception for sentences arising from C plea agreements. Binding C plea agreements had been in effect for ten years when Congress enacted § 3582(c)(2), yet Congress made no exception for sentences arising from such agreements. The Sixth Circuit's ban rests on a misreading of Rule 11(c)(1)(C) as binding the district court not only to abide by the terms of a C plea agreement in imposing sentence, but also to never reduce a sentence under § 3582(c)(2). Rule 11(c)(1)(C) does not address sentence reductions, and it cannot be interpreted to override the plain terms of § 3582(c)(2). This Court should also reject the approach of other circuits that sentences arising from C plea agreements by definition can only be "based on" the agreement and never a guideline range. Indeed, Rule 11(c)(1)(C) was amended in 1999 to reflect the impact of the Guidelines and the fact that C plea agreements are often based on the Guidelines.

This Court should instead adopt the case-by-case approach of a growing number of circuits that answer the question of whether a sentence is "based on" a subsequently amended guideline range by examining the plea agreement, the presentence report, and the

sentencing transcript in each particular case. There are many reasons to adopt such an approach, the most important of which is that the plain language of § 3582(c)(2) directs the district court to determine whether a defendant's particular "term of imprisonment" was "based on" the lowered guideline range. Moreover, the case-by-case approach better reflects actual practice. Just as the Guidelines are the starting point and initial benchmark in sentencing, so they are in plea bargaining. Courts often defer acceptance of a C plea agreement until they have reviewed the presentence report, *see* Fed. R. Crim. P. 11(c)(3)(A); USSG § 6B1.1(c), p.s., and they consider the Guidelines and justifiable departures and variances from the Guidelines in deciding whether to accept a C plea agreement, *see* USSG § 6B1.2, p.s. While not every sentence that arises from a C plea agreement is "based on" the Guidelines, a conclusive presumption that no such sentence is "based on" the Guidelines is unwarranted, as this case clearly demonstrates. Several other reasons favor adopting a case-by-case approach. It safeguards the statutory right to seek relief under § 3582(c)(2) by ensuring that any purported waiver of that right is made knowingly, intelligently, and voluntarily, and promotes transparency in the plea bargaining process. In doing so, it promotes the integrity of the judicial system in general and the plea bargaining process in particular.

The categorical approach undermines the plea bargaining process because it creates a presumption that the defendant waived his or her statutory right to seek relief under § 3582(c)(2) without an affirmative showing of a valid waiver. This conflicts with the principle that a waiver is an intentional relinquishment of a known right. The requirement that absent an agreement of the parties,

Rule 11(c)(1)(C) precludes a § 3582(c)(2) sentence reduction presumes waiver from silence. As such, it conflicts with the constitutional protections afforded guilty pleas and basic principles of contract law.

A waiver must be expressly stated in the plea agreement. If the government wished Mr. Freeman to waive his right to be considered for a § 3582(c)(2) sentence reduction, it had the obligation as the drafter of the plea agreement to include that specific provision in the document, and it bears the consequences of its failure to do so. This rule is especially applicable here, since the integration clause of the plea agreement shows that all of the terms and conditions agreed upon by the parties are contained within the four corners of the document. The document contains no waiver of rights under § 3582(c)(2). No waiver may be presumed.

The view that Rule 11(c)(1)(C) precludes relief under § 3582(c)(2) is premised on the notion that sentences imposed pursuant to C plea agreements are immutable by virtue of Rule 11(c)(1)(C). That view is contrary to congressional policy, which is to provide for review and reduction of sentences that were systematically too harsh. Moreover, the consequence of this view would be that motions by the government under Federal Rule of Criminal Procedure 35(b) and motions by the Bureau of Prisons under § 3582(c)(1)(A) would also be unavailable when the sentence arose from a C plea agreement. But that is not the case.

In sum, there is no legal, factual, or sensible policy basis for the Sixth Circuit's categorical ban on sentence reductions for defendants who entered into C plea

agreements. The judgment of the Sixth Circuit should therefore be reversed and the case remanded to the district court for consideration of Mr. Freeman's motion to reduce his sentence under § 3582(c)(2).

ARGUMENT

A DEFENDANT WHO ENTERED INTO A BINDING PLEA AGREEMENT UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 11(c)(1)(C) IS ELIGIBLE FOR A SENTENCE REDUCTION UNDER 18 U.S.C. § 3582(c)(2) WHEN HIS OR HER TERM OF IMPRISONMENT WAS "BASED ON" A GUIDELINE RANGE THAT WAS RETROACTIVELY LOWERED BY THE SENTENCING COMMISSION.

Section 3582(c)(2) provides one of the ways in which a court may "modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). It provides that "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), . . . 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).

"When the Commission makes a Guidelines amendment retroactive, 18 U.S.C. § 3582(c)(2) authorizes a district court to reduce an otherwise final sentence that is based on the amended provision." *Dillon v. United*

States, 130 S. Ct. 2683, 2688 (2010). It is undisputed that in Amendment 706, the Sentencing Commission lowered the base offense levels for crack cocaine offenses pursuant to § 994(o), *see* USSG App. C, amend. 706 (Nov. 1, 2007), and that the Commission included Amendment 706 in its list of retroactive amendments in USSG § 1B1.10(c), p.s. *See* USSG App. C, amend. 713 (Mar. 3, 2008). The only question in this case is whether William Freeman's original term of imprisonment was "based on" the subsequently lowered guideline range. It was. He is therefore eligible for a sentence reduction, and the contrary conclusion of the Sixth Circuit should be reversed.

A. Under the Plain Language of § 3582(c)(2), and According to the Express Terms of the Plea Agreement, the Presentence Report, and the Sentencing Transcript, Mr. Freeman's Original Term of Imprisonment Was "Based On" a Subsequently Lowered Guideline Range.

1. Mr. Freeman is eligible for a sentence reduction under the plain language of § 3582(c)(2).

The Court starts, "as always, with the language of the statute." *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009). Section 3582(c)(2) authorizes sentence reductions in the circumstances it specifies. The only circumstance in dispute is whether Mr. Freeman's term of imprisonment was "based on" a subsequently lowered guideline range. The statute does not define "based on," but the term is a common, easily understood one, and nothing about § 3582(c)(2) suggests that the term should be given anything other than its ordinary meaning. Giving "based on" its plain meaning accords with the basic rules of

statutory construction. "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

Special "guidance is hardly necessary" in interpreting such a common phrase. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). In *Nelson*, this Court had no trouble interpreting the words "based upon" in 28 U.S.C. § 1605(a)(2). Though the statute at issue contained "no definition of the phrase" and "the relatively sparse legislative history offer[ed] no assistance," the very ordinariness of the term made interpretation a simple matter of turning to the common, dictionary meaning.[2]

The verb "base" means (1) "to make, form, or serve as a base for," *see* Merriam-Webster Dictionary, www.merriam-webster.com; (2)"[t]o make, lay, or form a foundation for," *see* Oxford English Dictionary, http://dictionary.oed.com/; and (3) to "have as the foundation for (something); use as a point from which (something) can develop," *see* Oxford American College Dictionary 104 (2002). The plain language of the statute thus requires

[2] Similarly, § 3582(c)(2)'s legislative history does not elaborate on the meaning of "based on." *See* S. Rep. No. 98-225, at 121 (1983) (stating simply that § 3582(c)(2) "permits the court to reduce a term of imprisonment . . . if the term was based on a sentencing range in the applicable guideline that was lowered by the Sentencing Commission after the defendant's sentence was imposed and if such a reduction is consistent with applicable policy statements of the Sentencing Commission"). Nor was the term the subject of the only amendment to § 3582(c)(2) since it was enacted, *see* Pub. L. 100-690, Title VII, § 7107, 102 Stat. 4418 (Nov. 18, 1988) (striking "28 U.S.C. 994(n)" and inserting "28 U.S.C. 994(o)").

that the retroactively lowered guideline range was the foundation for, or the point of development for, the term of imprisonment that was imposed.

These ordinary meanings are confirmed by the context and purpose of § 3582(c)(2). *Cf. Nelson*, 507 U.S. at 357 ("What the natural meaning of the phrase 'based upon' suggests, the context confirms."). When Congress enacted § 3582(c)(2) as part of the Sentencing Reform Act of 1984, it expected that the Commission would make amendments retroactive "because of a change in the community view of the offense," S. Rep. No. 98-225, at 180 (1983), and it intended that the "value" of the "safety valve[ ]" under § 3582(c)(2) would be "the availability of specific review and reduction of a term of imprisonment . . . to respond to changes in the guidelines," *id*. at 56. When Congress enacted § 3582(c)(2) in 1984, binding C plea agreements had been in effect for ten years.[3] If Congress meant to exclude sentences reflected in C plea agreements from the § 3582(c)(2) safety valve, it could have done so, but

[3] From 1974 to 1999, Rule 11(e)(1)(C) provided that the agreement may specify that the government will "agree that a specific sentence is the appropriate disposition of the case." Such agreements were binding on the court once accepted. *See, e.g.*, *United States v. Veri*, 108 F.3d 1311 (10th Cir. 1997); *United States v. French*, 719 F.2d 387 (11th Cir. 1983); *United States v. Stevens*, 548 F.2d 136 (9th Cir. 1977). In 1999, Rule 11(e)(1)(C) was amended to provide that the agreement may specify that the government will "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case," and to state that "[s]uch a plea agreement is binding on the court once it is accepted by the court." In 2002, subsection (e)(1)(C) was moved with minor stylistic changes to subsection (c)(1)(C).

it did not. Where, as here, a sentence was "based on" a subsequently lowered guideline range, whether or not the sentence was the subject of a C plea agreement, review and reduction must be available as Congress intended.

Mr. Freeman's sentence was clearly "based on" a subsequently lowered guideline range. He received a term of imprisonment of 106 months: concurrent terms of 12 and 46 months, with the 46-month term determined by the base offense level for 3.4 grams of crack cocaine, *see* USSG § 2D1.1(c)(9) (2004 ed.), and a consecutive statutory minimum term of 60 months under 18 U.S.C. § 924(c) and USSG § 2K2.4(b). Amendment 706 lowered the guideline range for 3.4 grams of crack from 46-57 months to 37-46 months. *See* USSG § 2D1.1(c)(10) (2008 ed.). Thus, Mr. Freeman was sentenced "based on" the subsequently lowered guideline range. Under a straightforward reading of § 3582(c)(2), Mr. Freeman is eligible for relief.

2. The express terms of the plea agreement, the presentence report, and the sentencing transcript confirm that Mr. Freeman's sentence was "based on" the subsequently lowered guideline range.

The key provision of the plea agreement is Paragraph 12: "Defendant agrees to have his sentence determined pursuant to the Sentencing Guidelines." J.A. 28a. The plain language of Paragraph 12 alone supports the conclusion that Mr. Freeman's sentence was intended to be and was in fact "based on" the Guidelines. This conclusion is confirmed by other provisions in the agreement explaining that the agreed-upon sentence was determined by calculating the Guidelines.

Paragraph 11A states: "Both parties have independently reviewed the Sentencing Guidelines applicable in this case." J.A. 27a. The parties did not merely review the Guidelines, they applied them to the facts of Mr. Freeman's case. "[I]n their best judgment and belief," the parties "concluded" that the Guidelines would apply as follows:

> A. The applicable Offense Level should be determined as follows:
>
> | | | |
> |---|---|---|
> | Base offense level: | 22 | USSG § 2D1.1 (drug quantity table) |
> | | -3 | USSG § 3El.1(a) & (b). |
> | Adjusted offense level | 19 | |

J.A. 27a. Paragraph 11A also stated that the conviction under 18 U.S.C. § 924(c) "carries a 60-month sentence which must be served consecutively to any sentence for the underlying drug trafficking offense," J.A. 27a, which is also required by the Guidelines. *See* USSG § 2K2.4(b). And, in Paragraph 10, the paragraph in which the government agreed "that a sentence of 106 months incarceration is the appropriate disposition of this case," the government agreed to a three-level reduction for acceptance of responsibility pursuant to USSG § 3E1.1(a) and (b).[4] Thus, the parties followed the course charted

[4] The government also agreed in Paragraph 10 to a fine at the lowest end of the applicable guideline range, J.A. 25a-26a, and Mr. Freeman agreed in Paragraph 5 to a term and conditions of supervised release as required by the Guidelines, J.A. 23a.

through the Guidelines by the application instructions in USSG § 1B1.1 (2004 ed.).

The only issue left open was Mr. Freeman's criminal history category. The parties "anticipate[d] a Criminal History Category of IV," but agreed that criminal history would be determined upon completion of the PSR, and "reserve[d] the right to object to the USSG § 4A1.1 calculation of [Mr. Freeman's] criminal history." J.A. 27a-28a. In addition, while the agreement originally stated that the parties "agree[d] not to seek a departure from the Criminal History Category pursuant to USSG § 4A1.3," that provision was crossed out and initialed by the prosecutor and defense counsel, thus permitting either party to move for such departure. J.A. 28a.

The plea agreement then specified that the foregoing statements regarding the applicability of sections of the Guidelines and the statement of facts (set forth in Paragraph 3) "are not binding upon the Court," and that the court would "independently calculate the Guidelines at sentencing." J.A. 28a.

After Mr. Freeman entered a guilty plea to all of the charges against him, the Probation Office prepared a PSR in which it independently applied the Guidelines to the facts of the case and Mr. Freeman's criminal history. The report confirmed that the total offense level was 19, the criminal history category was IV, and the guideline range was 46-57 months followed by a mandatory consecutive sentence of 60 months on the § 924(c) conviction. J.A. 134a. At sentencing, the court "adopt[ed] the findings of the probation officer disclosed in the probation report and application of the guidelines as set out therein," imposed

a sentence of 106 months, and noted that it was within the guideline range. J.A. 47a, 49a.

As shown above, the subsequently lowered guideline range was the very foundation of the plea agreement, the court's acceptance of that agreement, and the sentence imposed. Thus, Mr. Freeman's sentence was "based on a sentencing range that has been subsequently lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). As the Tenth Circuit has correctly observed in a case involving similar facts, a sentence "may be *both* a guidelines-based sentence eligible for treatment under § 3582(c)(2) and a sentence stipulated to by the parties in a plea agreement pursuant to Rule 11(e)(1)(C)." *United States v. Cobb*, 584 F.3d 979, 984 (10th Cir. 2009) (internal quotation marks and citation omitted).[5] It does not follow from the binding nature of a Rule 11(c)(1)(C) plea agreement that the district court lacks authority to reduce a sentence under § 3582(c)(2), provided the requirements of the statute are met. They were met here. The plainly written terms of the plea agreement and the court's adoption of the probation officer's independent calculation of the guideline range in accepting that agreement establish that Mr. Freeman's sentence was "based on" the subsequently lowered guideline range.

[5] Cobb pled guilty under Federal Rule of Criminal Procedure 11(e)(1)(C), the predecessor of current Rule 11(c)(1)(C).

B. This Court Should Reject the Sixth Circuit's Categorical Ban on Sentence Reductions Under § 3582(c)(2) and Should Adopt a Case-by-Case Approach.

The denial of relief for Mr. Freeman by the courts below stems not from the plain language of § 3582(c)(2) or from the actual basis of the sentence as reflected in the plea agreement, the PSR, and the sentencing transcript, but instead from the mere existence of a plea agreement that, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), called for a specific sentence. According to the Sixth Circuit, Rule 11(c)(1)(C) itself precludes relief under § 3582(c)(2) for any defendant who enters into such an agreement. Other courts of appeals have reached the same result by holding that when a district court accepts such an agreement, the sentence is by definition "based on" the agreement and not on the subsequently lowered guideline range. These views find no support in § 3582(c)(2) or in Rule 11(c)(1)(C). In contrast, many courts of appeals apply a case-by-case approach, examining the terms of the agreement and the sentencing transcript to determine whether the term of imprisonment was in fact "based on" a subsequently lowered guideline range, as § 3582(c)(2) requires. This Court should reject the Sixth Circuit's categorical ban and adopt a case-by-case approach.

1. The Sixth Circuit's approach ignores the plain language of § 3582(c)(2) and rests on a misinterpretation of Rule 11(c)(1)(C).

In this case, both the district court's denial of Mr. Freeman's § 3582(c)(2) motion and the Sixth Circuit's affirmance of that denial rested solely on the Sixth Circuit's earlier decision in *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004). *See* J.A. 68a-69a, 73a-74a. That decision did not rely on the language of 18 U.S.C. § 3582(c)(2), but instead held that Rule 11(c)(1)(C) itself prohibits any sentence reduction under the statute.

In *Peveler*, the defendant and the government entered into a plea agreement pursuant to Rule 11(e)(1)(C) and the defendant pled guilty to drug offenses and to carrying a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c). *See* 359 F.3d at 372-73. The plea agreement "expressly provided" that the offense level would be 30, set out the guideline calculation, and provided that the government would "recommend a sentence of imprisonment at the low end of the applicable Guideline Range but not less than any mandatory minimum." *Id.* The district court accepted the parties' guideline calculation and imposed a sentence consistent with the plea agreement. *Id.* at 373.

Peveler subsequently filed a motion under § 3582(c)(2) to reduce his sentence in light of a retroactive amendment applicable to his sentence. *Id.* at 374. The court of appeals held:

> [A]bsent an agreement of the parties, the plain language of the current version of Rule 11(e)(1)(C), now Rule 11(c)(1)(C), generally

> precludes the district court from altering the parties' agreed sentence under 18 U.S.C. § 3582(c). This conclusion applies despite the retroactivity of a subsequent amendment to a relevant guideline utilized to determine the defendant's sentence.

Id. at 379. The Sixth Circuit did not rely on the language of § 3582(c)(2) to support this ruling. Instead, it decided to "defer" to its interpretation of certain language in Rule 11(c)(1)(C) and decisions under former Rule 11(e)(1)(C). *See* 359 F.3d at 378.

The court reasoned that "a rule of criminal procedure can limit a court's authority," *Peveler*, 359 F.3d at 375 (citing *United States v. Robinson*, 361 U.S. 220, 223, 229-30 (1960) (rules of procedure govern whether time for filing notice of appeal may be enlarged)); that Rule 11(c)(1)(C) and decisions under prior Rule 11(e)(1)(C) precluded a district court from accepting an agreement and then imposing a greater or lesser sentence, *id.* at 377; and thus, that Rule 11(c)(1)(C) precludes the district court from entertaining a motion under § 3582(c)(2) "despite the retroactivity of a subsequent amendment to a relevant guideline utilized to determine the defendant's sentence." *Id.* at 378-79. In sum, according to *Peveler*, Rule 11(c)(1)(C) itself binds the district court not only to abide by the terms of a C plea agreement in imposing sentence, but also to never reduce the sentence pursuant to § 3582(c)(2), even when the sentence imposed was "based on" a subsequently lowered guideline range as the statute provides.

The Sixth Circuit's reasoning is deeply flawed. First, the court ignored the plain language of § 3582(c)(2),

which requires only that the term of imprisonment was "based on" a subsequently lowered guideline range, and contains no exception for sentences arising from C plea agreements. That the district court is bound to abide by a C plea agreement in imposing sentence once it accepts the agreement does not mean that the sentence imposed is not "based on" the Guidelines as provided by § 3582(c)(2). Indeed, Rule 11(c)(1)(C) reflects the opposite assumption. It was amended in 1999 "to reflect the impact of the Sentencing Guidelines on guilty pleas," and to "recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor." Fed. R. Crim. P. 11 advisory committee's note (1999).

Second, even assuming that the Sixth Circuit was correct in its theory that a rule of procedure can limit the court's authority under the plain language of § 3582(c)(2),[6] it erred in reading into Rule 11(c)(1)(C) a limitation on the court's authority that does not exist. Rule 11(c)(1)(C) contains no hint of a prohibition on future sentence reductions under § 3582(c)(2) (or on any other

[6] A rule of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The Sixth Circuit's theory that Rule 11(c)(1)(C) can prohibit district courts from considering a motion under § 3582(c)(2) when the sentence imposed was "based on" a subsequently lowered guideline range, as the statute provides, crosses the line from "govern[ing] only 'the manner and the means' by which the litigants' rights are 'enforced,'" to "alter[ing] 'the rules of decision by which [the] court will adjudicate [those] rights." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (internal citations and quotation marks omitted).

ground) for a defendant who entered a C plea agreement. The language in Rule 11(c)(1)(C) on which the Sixth Circuit relied was that "such a recommendation or request binds the [district] court once the court accepts the plea agreement." *Peveler*, 359 F.3d at 377. Likewise, the decisions under Rule 11(e)(1)(C) on which the Sixth Circuit relied held that a district court may not accept the agreement and then impose a sentence greater or less than the agreed-upon sentence. *See United States v. Debreczeny*, 69 Fed. Appx. 702, 705 (6th Cir. 2003); *United States v. Taylor*, 14 Fed. Appx. 546, 552-53 (6th Cir. 2001). But this language and these cases establish only the unremarkable proposition that, when a district court accepts a C plea agreement at or before sentencing, it must *impose* a sentence according to the parties' recommendation of "a specific sentence or sentencing range . . . or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply." Fed. R. Crim. P. 11(c)(1)(C). This does not mean, as *Peveler* suggests, that the court may not "reduce" the sentence under § 3582(c)(2).[7] The rule does not speak to sentence *reductions* at all. When a court accepts a C plea agreement, "the agreed disposition

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[7] Even if the *Peveler* decision were correct, Mr. Freeman's plea agreement is ambiguous as to whether it was actually binding on the court. It stated that the "defendant may not withdraw the plea of guilty solely because the Court does not agree with either the statement of facts or Sentencing Guideline application," and also that if the court "refuses to accept" the agreement, he "will be allowed to withdraw the plea of guilty." J.A. 28a, 31a. This ambiguity as to whether the agreement was binding on the court, *see* Fed. Crim. P. 11(c)(5), (d)(2)(A), must be resolved against the government as the drafter of the agreement. *See United States v. Seckinger,* 397 U.S. 203, 210 (1970); *United States v. Woods*, 581 F.3d 531, 534 (7th Cir. 2009).

[is] included in the judgment." Fed. R. Crim. P. 11(c)(4). After that sentence "has been imposed," the court "may reduce" it under the circumstances specified in § 3582(c)(2). *See* 18 U.S.C. § 3582(c); *see also Dillon v. United States*, 130 S. Ct. 2683, 2690 (2010) (§ 3582(c)(2) "does not authorize a sentencing," but instead "giv[es] courts the power to 'reduce' an otherwise final sentence.").

The *Peveler* court also noted that there may be exceptions to its otherwise "blanket bar" on § 3582(c)(2) relief to allow modification "to avoid a miscarriage of justice or to correct a mutual mistake." 359 F.3d at 378 n.4 (internal quotation marks and citation omitted). The Sixth Circuit's recognition of exceptions undermines its ruling that a Rule 11(c)(1)(C) plea renders a defendant automatically ineligible for a sentence reduction under § 3582(c)(2). It cannot be that, even though § 3582(c)(2) makes no mention of Rule 11(c)(1)(C), it both silently forbids reduction of sentences arising from C plea agreements and silently creates an exception to its own silent ban.[8]

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[8] In this case, the Sixth Circuit ruled that Mr. Freeman did not meet *Peveler's* "miscarriage of justice" exception – even though the district court indicated that it would grant Mr. Freeman's motion for a reduction in sentence if not for *Peveler* – because his sentence "fell at the bottom of the range before the amendment and at the top of the range after the amendment." J.A. 75a. This, of course, is generally true of defendants seeking a two-level reduction under Amendments 706 and 713. These amendments were promulgated to partially remedy an "urgent and compelling" injustice. *See* USSG App. C, amend. 706 (Nov. 1, 2007) (reason for amendment); *id.* amend. 713 (reason for amendment). Any amount of actual jail time, including an amount due to a two-level difference in a guideline range, is significant. *Cf. Glover v. United States*, 531 U.S. 198 (2001).

The *Peveler* court also found support in inapposite caselaw. It stated that the Tenth Circuit, in *United States v. Trujeque*, 100 F.3d 869 (10th Cir. 1996), and the Seventh Circuit, in *United States v. Hemminger*, 114 F.3d 1192, 1997 WL 235838 (7th Cir. May 2, 1997) (unpublished table decision), had "held that retroactive amendments to the sentencing guidelines provide legally insufficient basis on which to modify a sentence under a Rule 11(e)(1)(C) plea agreement." 359 F.3d at 377. But *Trujeque* said no such thing. In that case, the Tenth Circuit applied a case-by-case approach, finding that the "facts establish that Mr. Trujeque's sentence was not 'based on a sentencing range that has subsequently been lowered,'" where the original guideline range was 121-151 months and the parties stipulated to a sentence of 84 months without explaining how this sentence was reached. *Trujeque*, 100 F.3d at 870 & n.2, 871. The Tenth Circuit has since made clear that *Trujeque*'s holding does not apply in a case in which the agreed-upon disposition was in fact "based on" the Guidelines. *See United States v. Cobb*, 584 F.3d 979, 983 (10th Cir. 2009). *Hemminger*, a one page non-precedential opinion, simply declared without explanation that a "sentence under a Rule 11(e)(1)(C) plea rests on the parties' agreement, not on a calculation under the Sentencing Guidelines." 1997 WL 235838, at *1. The Seventh Circuit has since held that not all Rule 11(c)(1)(C) agreements foreclose relief under § 3582(c)(2); if, for example, the original sentence was below the guideline range and the plea agreement explains how that sentence was reached in relation to the guideline range, then the sentence was "based on" the guideline range. *United States v. Franklin*, 600 F.3d 893, 897 (7th Cir. 2010).

Nonetheless, a categorical rule has been followed by other circuits, which have concluded that the binding nature of Rule 11(c)(1)(C) deprives the district court of authority to modify the sentence at any time, *see United States v. Scurlark*, 560 F.3d 839, 841-43 (8th Cir.), *cert. denied*, 130 S. Ct. 738 (2009), or that a sentence imposed under a C plea agreement is by definition "based on" the agreement and not on the Guidelines, *see United States v. Green,* 595 F.3d 432, 437 (2d Cir. 2010); *United States v. Sanchez*, 562 F.3d 275, 282 & n.8 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1053 (2010).

A growing number of courts of appeals disagree, recognizing that "wooden rules will not do," and that answering the question of "whether a sentence is 'based on' the subsequently amended crack-offense guidelines . . . requires that we examine the nuances of both the plea agreement and the sentencing transcript in each particular case." *United States v. Garcia*, 606 F.3d 209, 214 (5th Cir. 2010); *see also United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009) (stating that "the terms of the plea agreement are key to determining whether the defendant's sentence was, in fact, based on a sentencing range that was later reduced by the Sentencing Commission"), *cert. denied*, 130 S. Ct. 1160 (2010); *Cobb,* 584 F.3d at 983-84 (concluding that district court had authority to consider defendant's motion under § 3582(c)(2) where plea agreement, change of plea hearing, and sentencing hearing all reflected that defendant's sentencing disposition "was tied to the guidelines at every step"); *Franklin*, 600 F.3d at 896-97 (clarifying that a sentence below the guideline range may be "based on" the guidelines if the plea agreement evidences "an intent to tie the sentence to the guidelines"); *United States v. Main*,

579 F.3d 200, 203 (2d Cir.) (concluding from examination of plea agreement, guidelines, and sentencing transcript that defendant's sentence was not "based on" a guideline that was subsequently lowered), *cert. denied*, 130 S. Ct. 1106 (2009); *United States v. Williams*, 609 F.3d 368, 373 (5th Cir. 2010) (review of plea agreement, sentencing record, and guidelines revealed no connection to guidelines).

2. The case-by-case approach implements the plain language of § 3582(c)(2), comports with actual sentencing practice, and promotes the integrity of the judicial system in general and the plea bargaining process in particular.

This Court should reject the Sixth Circuit's categorical rule and instead adopt a case-by-case approach. A case-by-case approach implements § 3582(c)(2)'s plain language, which directs the district court to determine whether a defendant's particular "term of imprisonment" was "based on" the subsequently lowered guideline range. A district court can best accomplish that task by reviewing the specific terms of a plea agreement, the applicable guideline calculations, and the sentencing record. "District judges are certainly capable of . . . identifying those Rule 11(c)(1)(C) sentences that were based on Guideline ranges that were subsequently modified, and those that were not," by "evaluat[ing] the agreement and the surrounding circumstances." *Goins*, 355 Fed. Appx. at 8, J.A. 88a. (White, J., concurring).

The case-by-case approach reflects actual practice. The Guidelines are "the starting point and the initial benchmark" for all sentencing decisions. *Gall v. United States*, 552 U.S. 38, 49 (2007). Accordingly, the Guidelines

are, at least, the starting point and initial benchmark for plea negotiations. As Judge White correctly noted, "Rule 11(c)(1) negotiations and the resulting agreements are informed and shaped by the existing Guidelines. The parties evaluate their gains and concessions using the Guidelines as their yardstick." J.A. 82a (White, J., concurring). In some cases, as in this case, the Guidelines are not just the starting point in the negotiations but the end point. Mr. Freeman's plea agreement specifically stated that it was based on the Guidelines, and it set forth a guideline calculation that was determined by the Probation Office and the court to be correct. J.A. 27a-28a, 47a, 111a-113a, 128a, 134a.

As a general matter, under Rule 11 and the Sentencing Commission's policy statements, the district court considers the correctly calculated guideline range in deciding whether to accept a C plea agreement. The court may accept or reject a C plea agreement when the plea is entered, or, as here, "defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A); USSG § 6B1.1(c), p.s. (same). Further, § 6B1.2(c), p.s., advises: "In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that: (1) the agreed sentence is within the applicable guideline range; or (2)(A) the agreed sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order." *Id*. Here, the court accepted the agreement after satisfying itself that the agreed sentence was within the applicable guideline range. J.A. 47a, 49a. In other cases, the court satisfies itself that the agreed sentence departs or varies from the guideline range for justifiable reasons.

The Commission recognizes that sentences below the guideline range can be "based on" the guideline range by acknowledging that such sentences may be reduced. USSG § 1B1.10(b)(2)(B), p.s.; *id.* comment. (n.3).

As a general matter, prosecutors must consider the Guidelines in negotiating plea agreements and making sentencing recommendations. Department of Justice guidance in effect at the time of Mr. Freeman's original sentencing directed prosecutors that "[a]ny sentencing recommendation . . . must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct." Memorandum to All Federal Prosecutors from John Ashcroft, Attorney General, Regarding Departmental Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, at 5 (Sept. 22, 2003). This guidance further stated that there were "only two types of permissible sentence bargains" – "1. Sentences within the Sentencing Guidelines range," and "2. Departures." *Id.* at 6. As to the latter, prosecutors were directed "to ensure that the circumstances in which [they] will request or accede to a downward departure in the future are properly circumscribed," and to obtain Department or supervisory authorization for any such departure. *Id.* Attorney General Holder recently issued guidance directing that "prosecutors should generally continue to advocate for a sentence within [the guideline] range," and that all "prosecutorial requests for departures or variances – upward or downward – must be based on specific and articulable facts, and require supervisory approval." Memorandum to All Federal Prosecutors from Eric H. Holder, Attorney General, Regarding Department Policy on Charging and Sentencing, at 2-3 (May 19, 2010).

Of course, not every sentence reflected in a C plea agreement is "based on" the applicable guideline range. But a conclusive presumption that *no* such sentences are "based on" the applicable guideline range is not consistent with actual practice.

Moreover, a case-by-case approach serves several salutary purposes. It safeguards the statutory right to seek relief under § 3582(c)(2) by ensuring that any purported waiver of that right is made knowingly, intelligently, and voluntarily, and promotes transparency in the plea bargaining process. In doing so, it promotes the integrity of the judicial system in general and the plea bargaining process in particular.

In contrast, a categorical approach undermines the plea bargaining process because it acts as a presumption that the defendant waived his or her statutory right without an affirmative showing of a valid waiver of the right. Such a presumption is antithetical to the general rules for establishing the validity of a guilty plea, and conflicts with the principle that a "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). And, as discussed in Part C, *infra*, presuming waiver where, as here, the plea agreement is silent on the availability of § 3582(c)(2), violates basic principles of contract law.

For all of these reasons, the Court should reject the Sixth Circuit's categorical ban and adopt a case-by-case approach. Applying such an approach in this case requires reversal of the judgment below, as the plea agreement, presentence report, and transcript of the sentencing

hearing all demonstrate that Mr. Freeman's term of imprisonment was "based on" a subsequently lowered guideline range. *See supra* pages 3-6, 18-21.

C. The Absence of Any Reference to § 3582(c)(2) Relief in the Plea Agreement Does Not Constitute a Waiver of the Right to Seek That Relief.

The Sixth Circuit precludes defendants with Rule 11(c)(1)(C) plea agreements from obtaining consideration of a motion for sentence reduction under § 3582(c)(2) "absent an agreement of the parties." *Peveler*, 359 F.3d at 379. The First Circuit has adopted the same view. *See United States v. Rivera-Martinez*, 607 F.3d 283, 284 (1st Cir. 2010) ("[I]n the absence of explicit countervailing language in the plea agreement, 18 U.S.C. § 3582(c)(2) does not apply and, therefore, such a defendant is ineligible for the sentence reduction."); *id.* at 287 (citing *Peveler*, 359 F.3d at 378-79). This view that the opportunity to file a motion under § 3582(c)(2) is waived unless specifically reserved not only conflicts with basic contract law but also conflicts with the constitutional protections surrounding guilty pleas, and is further flawed because it presumes waiver from silence.

Ordinary principles of contract interpretation are used to determine whether a right has been waived. *See United States v. Cooley*, 590 F.3d 293, 296 (5th Cir. 2009); *United States v. Monroe*, 580 F.3d 552, 556 (7th Cir. 2009). A plea agreement, of course, is more than an ordinary contract because it involves the waiver of fundamental constitutional rights as well as other important rights, and "necessarily implicates the integrity of the criminal justice system." *United States v. Cvijanovich*, 556 F.3d 857, 862

(8th Cir. 2009) (internal quotation marks and citation omitted). Since a guilty plea implicates a defendant's fundamental and constitutional rights, a court must "analyze a plea agreement with greater scrutiny than [it] would apply to a commercial contract . . . [and] thus hold the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements." *United States v. Jordan*, 509 F.3d 191, 195-96 (4th Cir. 2007).

In the absence of an explicit waiver of the right to have a motion for relief under § 3582(c)(2) considered, a waiver cannot be presumed, implied, or read into the plea agreement. To do so would undermine the validity of the guilty plea, which requires a knowing and voluntary waiver of rights. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969). "[T]he Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary and that the defendant must make related waivers knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (internal quotation marks and other citations omitted).

A waiver likewise cannot be implied from silence under ordinary contract principles. A waiver must be explicitly stated. In interpreting a collective bargaining agreement, this Court has said that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983) (footnote

omitted). That principle applies with equal, if not greater, force to plea agreements. *See Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984) (while a plea agreement is an "executory agreement," it takes on "constitutional significance" when "embodied in the judgment of a court"); *Santobello v. New York*, 404 U.S. 257, 261 (1971) (desirability of plea bargaining "presupposes fairness in securing agreement between an accused and a prosecutor").

Silence on whether relief may be sought under § 3582(c)(2) cannot waive the right to do so. While Mr. Freeman and the government may have agreed to a particular sentence, they did not agree that the sentence could never be reduced pursuant to § 3582(c)(2). Where, as here, a plea agreement is silent on § 3582(c)(2), it must be presumed that the defendant did not waive the right to a future sentence reduction under the statute. Such a presumption clarifies the plea bargaining responsibilities of the parties by requiring that the drafter include an express waiver of § 3582(c)(2) rights if that is intended. That result, as shown below, is required by well-established principles of contract law.

In any event, Mr. Freeman's plea agreement explicitly precludes a waiver of § 3582(c)(2) relief from being read into or implied from it. Paragraph 25 states:

> This document states the complete and only Plea Agreement between the United States Attorney for the Western District of Kentucky and [Mr. Freeman] in this case, and is binding only on the parties to this Agreement, supersedes all prior understandings, if any, whether written or oral, and cannot be modified

> other than in writing that is signed by all parties or on the record in Court. No other promises or inducements have been or will be made to [Mr. Freeman] in connection with this case, nor have any predictions or threats been made in connection with this plea.

J.A. 32a. Paragraph 25, which is characterized as an "integration clause," *see United States v. De-La-Cruz Castro*, 299 F.3d 5, 13 (1st Cir. 2002), means that all of the terms and conditions agreed upon by the parties are contained within the four corners of the document. *See United States v. Hunt*, 205 F.3d 931, 933 (6th Cir. 2000) (integration clause restricted the terms of the plea agreement "to those written within its four corners"). In evaluating a plea agreement, the court, "[c]onsistent with contract-law principles [will] look to the language of the document, focusing squarely within its four corners." *United States v. Anderson*, 921 F.2d 335, 337-38 (1st Cir. 1990); *see also United States v. Ortiz-Santiago*, 211 F.3d 146, 151 (1st Cir. 2000) (stating that "an inquiring court should construe the written document within its four corners, unfestooned with covenants the parties did not see fit to mention") (internal quotation marks and citations omitted). Within the four corners of Mr. Freeman's plea agreement, there is no language that can be construed as either an implicit or explicit waiver of consideration of a motion for a sentence reduction under § 3582(c)(2).

If the government wished Mr. Freeman to waive any future consideration of a § 3582(c)(2) sentence reduction, it had the obligation as the drafter of the plea agreement to include that provision in the document and it bears the consequences of its failure to do so. "In view of the

government's tremendous bargaining power [courts] will strictly construe the text against it when it has drafted the agreement." *United States v. Floyd*, 428 F.3d 513, 516 (3d Cir. 2005) (internal quotation marks and citation omitted). "'Both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.'" *United States v. Herrera*, 928 F.2d 769, 772 (6th Cir. 1991) (quoting *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986)).

To hold, as the Sixth Circuit did in *Peveler*, that silence as to § 3582(c)(2) relief bars such relief turns a fundamental principle of contract law on its head. To determine whether there has been a waiver of the right to seek § 3582(c)(2) relief, courts have looked to the specific terms of the plea agreement and found waiver only when clearly stated in the plea agreement. *Compare, e.g.*, *United States v. Stearns*, 479 F.3d 175, 177 (2d Cir. 2007) (§ 3582(c)(2) mentioned explicitly in waiver) *and United States v. Frierson*, 308 Fed. Appx. 298, 300 (10th Cir. 2009) (same) *with United States v. Woods*, 581 F.3d 531, 534-36 (7th Cir. 2009) (finding no waiver of § 3582(c)(2) relief where not expressly stated). Mr. Freeman's plea agreement contained no such express provision.[9] This absence must be held against the government as the drafter of the plea agreement.

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[9] Paragraph 13 of the plea agreement provided that Mr. Freeman "knowingly and voluntarily waives the right (a) to directly appeal his conviction and the resulting sentence pursuant to Fed. R. App. P. 4(b) and 18 U.S.C. § 3742, and (b) to contest or collaterally attack his conviction and the resulting sentence (Cont'd)

D. Sentences Imposed Pursuant to Rule 11(c)(1)(C) Are Not Immutable.

The view that Rule 11(c)(1)(C) precludes relief under 18 U.S.C. § 3582(c)(2) is premised on the notion that sentences imposed pursuant to C plea agreements are immutable by virtue of Rule 11(c)(1)(C). That view, however, is contrary to congressional policy. As this Court noted in *Dillon v. United States*, "§ 3582(c)(2) [was] intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." 130 S. Ct. 2683, 2692 (2010). When the Sentencing Commission lowers a guideline range and further determines that this reduction should apply retroactively, it recognizes that the original guideline was too harsh – so unfairly harsh that it is now necessary for *all* defendants whose sentences were based on that guideline to have an opportunity to obtain a sentence reduction. In such circumstances, Congress expected all sentences "based on" the reduced guideline range to be retroactively revisited. District courts retain discretion not to change sentences. But the nature of a plea agreement is not a bar to the important policy of providing review of sentences that were systematically too harsh.

Indeed, barring any future relief for defendants who entered into C plea agreements on the theory that Rule 11(c)(1)(C) renders their sentences immutable would mean

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(Cont'd)
pursuant to 28 U.S.C. § 2255 or otherwise." J.A. 28a. This language does not waive the right to seek a § 3582(c)(2) sentence reduction. *See, e.g.*, *United States v. Cooley*, 590 F.3d 293, 296-97 (5th Cir. 2009); *United States v. Woods*, 581 F.3d 531, 534-36 (7th Cir. 2009); *United States v. Monroe*, 580 F.3d 552, 556 (7th Cir. 2009); *United States v. Chavez-Salais*, 337 F.3d 1170, 1172-73 (10th Cir. 2003).

that motions filed by the government under Federal Rule of Criminal Procedure 35(b), and motions filed by the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A), are unavailable in cases in which the district courts accepted C plea agreements. That is clearly not the case.

Federal Rule of Criminal Procedure 35(b) allows the government to make a post-sentencing motion for a sentence reduction where a defendant has "provided substantial assistance in investigating or prosecuting another person." Courts have not viewed sentences imposed pursuant to Rule 11(c)(1)(C) as immutable for purposes of a Rule 35(b) sentence reduction. For example, in *United States v. Kollore*, No. 4:99CR553, 2009 WL 212959 (E.D. Mo. Jan. 28, 2009), the court, acting on the government's Rule 35(b) motion, later reduced the sentence of a defendant who had entered into a C plea agreement. *See also United States v. Roe*, 104 F.3d 357 (2d Cir. 1996) (defendant who entered into C plea agreement thereafter received Rule 35(b) departure for cooperation); c*f. United States v. Pollard*, 602 F. Supp. 2d 165, 168, 172-73 (D.D.C. 2009) (denying defendant's claim in 28 U.S.C. § 2255 proceeding that "the government engaged in prosecutorial misconduct by not filing a motion under Rule 35 to reduce her sentence," because C plea agreement stated that "the Government is not obligated and does not intend to file" a post-sentence Rule 35(b) motion). And, while motions for relief under 18 U.S.C. § 3582(c)(1)(A) by defendants who entered C pleas have been denied, it is not because of the type of plea they entered, but because the Bureau of Prisons did not file the motion as the statute requires. *See, e.g.*, *United States v. Ayala*, 351 Fed. Appx. 147, 149 (8th Cir. 2009).

The foregoing cases demonstrate that a C plea agreement is not in and of itself a bar to a subsequent sentence reduction, whether that reduction stems from Rule 35(b), § 3582(c)(1)(A), or § 3582(c)(2). If a C plea agreement does not preclude a defendant from receiving Rule 35(b) relief, then there is no reason that it should render him or her ineligible for a § 3582(c)(2) sentence reduction. From a policy standpoint, it would frustrate the interests of law enforcement in obtaining post-sentencing assistance from defendants if the government could not file a Rule 35(b) motion merely because a defendant entered into a C plea agreement.

If sentences imposed under Rule 11(c)(1)(C) were immutable, it would likewise frustrate 18 U.S.C. § 3582(c)(1)(A)(i) and (ii), which provide that the district court, upon motion of the Director of the Bureau of Prisons, may reduce a term of imprisonment if it finds that there are "extraordinary and compelling reasons" for doing so or "the defendant is at least 70 years of age" and "has served at least 30 years." As Judge White pointed out in her concurring opinion in this case, if Rule 11(c)(1)(C) deprives the district court of the authority to reduce a sentence under § 3582(c)(2), it would likewise deprive the court of authority to reduce the sentence of a defendant who met the criteria of § 3582(c)(1)(A)(i) or (ii). J.A. 86a. As she explained:

> In either case, the Government and the defendant bargained for a sentence that became binding on the court when the agreement was accepted. Yet, § 3582(c)(1) clearly contemplates that district courts will entertain such motions and have authority to grant them. Thus, Congress

> did not regard the binding nature of Rule 11(c)(1)(C) sentence agreements as trumping Congressional intent to permit sentence modification in certain limited circumstances, and any argument that § 3582(c)(2) does not encompass Rule 11(c)(1)(C) sentences must be based on the specific language of § 3582(c)(2), which . . . does not support such a limitation.

J.A. 86a-87a. The Sixth Circuit's position that Rule 11(c)(1)(C) renders immutable sentences imposed under its terms contravenes the plain language of § 3582(c)(1)(A) and (c)(2) and undermines the important "value" of these "safety valves" to "assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons' and to respond to changes in the guidelines." S. Rep. No. 98-225, at 21 (1983).

* * * * * * * *

As Mr. Freeman has shown, a guideline that was subsequently lowered figured prominently in his plea agreement, culminating with the provision that he "agrees to have his sentence determined pursuant to the Sentencing Guidelines," and a sentence imposed within the correctly calculated guideline range. J.A. 28a, 47a, 49a, 110a-113a. The Guidelines were the very foundation of Mr. Freeman's plea agreement and Paragraphs 10-12 thereof establish that the "appropriate disposition of this case" was "based on" the subsequently lowered guideline for his offense of possession with intent to distribute 3.4 grams of crack cocaine. J.A. 25a-28a. The Sixth Circuit's categorical ban on § 3582(c)(2) sentence reductions for defendants who enter C plea agreements not only

contravenes the plain language of § 3582(c)(2) and Rule 11, but also frustrates the Sentencing Commission's attempt to provide relief to defendants who were subject to an unduly harsh sentence. This case demonstrates that the best way to determine whether the sentence of a defendant who entered a C plea agreement is or is not "based on" the Guidelines is a case-by-case approach that examines the terms of the plea agreement, the applicable Guidelines, and the sentencing transcript. Mr. Freeman respectfully urges the Court to adopt that approach in resolving the question presented.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case should be remanded to the district court for consideration of Mr. Freeman's motion under § 3582(c)(2).

Respectfully Submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES AND OTHER PROVISIONS

1. 18 U.S.C. § 3582(c) - Imposition of a sentence of imprisonment, states:

> **(c) Modification of an imposed term of imprisonment** – The court may not modify a term of imprisonment once it has been imposed except that–
>
> (1) in any case–
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that–
>
> (i) extraordinary and compelling reasons warrant such a reduction; or
>
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned,

> and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and
>
> (B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and
>
> (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 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.

2. Federal Rule of Criminal Procedure 11 - Pleas, states in relevant part:

> **(c) Plea Agreement Procedure.**

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for

good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

> (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

> (A) the court rejects a plea agreement under Rule 11(c)(5); or
>
> (B) the defendant can show a fair and just reason for requesting the withdrawal.

3. United States Sentencing Guidelines § 1B1.10 – Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement) states in pertinent part:

> *****

(c) Covered Amendments.--Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.