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No. 09-10245

In the Supreme Court of the United States

WILLIAM FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the government and a defendant may enter into a plea agreement in which they "agree that a specific sentence or sentencing range is the appropriate disposition of the case," and "such a recommendation or request binds the court once the court accepts the plea agreement." Under 18 U.S.C. 3582(c)(2), a district court may reduce a term of imprisonment after it has been imposed if the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" and "such a reduction is consistent with applicable policy statement issued by the Sentencing Commission." The question presented is:

Whether a defendant who pleaded guilty under a Rule 11(c)(1)(C) plea agreement to a specific sentence may seek a reduction of that sentence under Section 3582(c)(2) after the retroactive reduction of a Guidelines range, on the theory that the sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 70a-92a) is not published in the *Federal Reporter* but is available at 355 Fed. Appx. 1. The opinion of the district court (J.A. 66a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2009. A petition for rehearing was denied on January 12, 2010 (J.A. 93a-94a). The petition for a writ of certiorari was filed on April 7, 2010, and granted on September 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES, RULES AND GUIDELINES PROVISIONS INVOLVED

Pertinent statutes and provisions of the Federal Rules of Criminal Procedure and the United States Sentencing Guidelines are reprinted in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

Following a guilty plea in the Western District of Kentucky, petitioner was convicted of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); possessing marijuana, in violation of 21 U.S.C. 844; possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), 924(a)(2). Pursuant to a plea agreement to a specific sentence under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, he was sentenced to 106 months of imprisonment, to be followed by five years of supervised release. J.A. 52a-57a. The United States Sentencing Commission later amended the Sentencing Guidelines to lower the base offense level for drug-trafficking offenses involving crack cocaine and made those amendments retroactively applicable to previously imposed sentences of imprisonment. In light of those amendments, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(2). The district court denied that motion, J.A. 66a-69a, and the court of appeals affirmed, J.A. 70a-92a.

1. a. Federal Rule of Criminal Procedure 11(c) establishes procedures for plea agreements. It provides that "[a]n attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement." Fed. R.

Crim. P. 11(c)(1). The rule then "divides plea agreements into three types, based on what the [g]overnment agrees to do." *United States* v. *Hyde*, 520 U.S. 670, 675 (1997). In the type at issue here—sometimes called a "type C" agreement, see *ibid.*, because it is described in Subparagraph (C) of Rule 11(c)(1)—the government and the defendant agree on aspects of the sentence that bind the sentencing court if the plea is accepted. More specifically, the rule provides as follows:

> the plea agreement may specify that an attorney for the government will:
>
> * * * * *
>
> (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).

Fed. R. Crim. P. 11(c)(1).[1] The rule further permits the district court to "accept [a type C] agreement, reject it or defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A).

Consistent with the "bind[ing]" nature of a type C agreement once it is "accept[ed]" by the court (Fed. R. Crim. P. 11(c)(1)(C)), the court is required, upon accepting the agreement, to "inform the defendant that * * * the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4); see *United States* v. *Kling*, 516

[1] Until 2002, the substance of Rule 11(c)(1)(C) appeared in Rule 11(e)(1)(C). When the provision was moved from subdivision (e) to (c) in 2002, the amendments were "intended to be stylistic only." Fed. R. Crim. P. 11 committee's note (2002 Amendment).

F.3d 702, 704 (8th Cir. 2008) ("A plea agreement under Rule 11(c)(1)(C), like all plea agreements, is binding on both the government and the defendant, but Rule 11(c)(1)(C) plea agreements are unique in that they are also binding on the court *after* the court accepts the agreement."). Similarly, if the court rejects such an agreement, it must, *inter alia*, "advise the defendant" that it is "not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea." Fed. R. Crim. P. 11(c)(5)(B).

b. In the Sentencing Reform Act of 1984 (SRA), 28 U.S.C. 991 *et seq.*, Congress created the United States Sentencing Commission and charged it with promulgating sentencing guidelines and policy statements "regarding application of the guidelines or any other aspect of sentencing or sentence implementation," 28 U.S.C. 994(a)(1) and (2). Congress also charged the Commission with periodically reviewing and revising its guidelines. 28 U.S.C. 994(*o*). When the Commission reduces a sentencing range, it may specify "in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. 994(u). As a result, the Commission has "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (emphasis omitted).

A court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c); see *Dillon* v. *United States*, 130 S. Ct. 2683, 2687 (2010). But, as relevant here, an exception to that stricture permits a modification "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*)." 18 U.S.C. 3582(c)(2). In such a case, Section 3582(c)(2) gives a court the discretion to "reduce the term of imprisonment," after considering the statutory sentencing factors set out in 18 U.S.C. 3553(a), but only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see 28 U.S.C. 994(a)(2)(C) (authorizing the Commission to promulgate policy statements "regarding * * * the sentence modification provisions set forth in section[] * * * 3582(c)").

The Commission has addressed such sentence reductions in a policy statement contained in Sentencing Guidelines § 1B1.10. Under that provision, a court may reduce a sentence if the amendment that lowered a Guidelines sentencing range is listed in subsection (c). *Id.* § 1B1.10(a)(1), p.s. But no reduction is permitted if, *inter alia*, "[the] amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range." *Id.* § 1B1.10(a)(2)(B), p.s. To calculate the amended guideline range, the court is instructed that it "shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." *Id.* § 1B1.10(b)(1), p.s.[2]

[2] *Dillon* concluded that a sentence-modification proceeding under Section 3582(c) is "fundamental[ly] differen[t]" from a "sentencing" proceeding. 130 S. Ct. at 2693. Thus, even though the Sentencing Guidelines were generally rendered advisory by *United States* v. *Booker*, 543 U.S. 220 (2005), a court may grant a reduction under Section 3582(c)(2) only "within the narrow bounds established by the Commission" in its policy statement in Guidelines § 1B1.10. *Dillon*, 130 S. Ct. at 2694.

c. This case involves the Sentencing Commission's 2007 amendments reducing the Guidelines sentencing ranges for offenses involving crack cocaine and specifying that those changes were retroactively applicable to sentences that had already been imposed.

Under the Sentencing Guidelines, a drug-quantity table (Guidelines § 2D1.1(c)) sets the base offense levels for drug offenses. Between 1987 and 2007, that table "treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine," because Congress had used that ratio in setting mandatory minimum sentences in 1986. *Kimbrough* v. *United States*, 552 U.S. 85, 96 (2007). "After several failed attempts" to reform the 100-to-1 ratio, "the Commission in 2007 amended the Guidelines to reduce by two levels the base offense level associated with each quantity of crack cocaine." *Dillon*, 130 S. Ct. at 2688; see 72 Fed. Reg. 28,571-28,572 (2007); Guidelines App. C Supp., Amend. 706 (amended by Amends. 711 and 715). The Commission later voted to make the crack-cocaine amendments retroactively applicable to sentences that had already been imposed, by including those amendments in Guidelines § 1B1.10(c). See 73 Fed. Reg. 217 (2008); Guidelines App. C Supp., Amend. 713.[3]

[3] The Commission described its 2007 amendments as only "an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio," and it noted that "[a]ny comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress." 72 Fed. Reg. at 28,573. Legislative action recently came in the form of the Fair Sentencing Act of 2010 (2010 Act), Pub. L. No. 111-220, 124 Stat. 2372, which raised the quantity of cocaine base that triggers a five-year mandatory-minimum sentence from 5 to 28 grams, and raised the quantity that triggers a ten-year mandatory-minimum sentence from 50 to 280 grams. *Id.* § 2(a), 124 Stat. 2372. Because the 2010 Act did not change the threshold quantities of powder cocaine (500

Approximately 25,000 defendants have sought sentence reductions in light of the Commission's decision to make the 2007 amendments retroactive, and more than 16,000 reductions have been granted. See U.S. Sentencing Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report*, tbl. 1 (Nov. 2010 Data), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Crack_Cocaine_Amendment/20101214_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf. Defendants who received such reductions have had their sentences reduced by an average of 26 months. *Id*. tbl. 8.

2. On September 14, 2004, an officer with the Louisville Metropolitan Police Department responded to a call and identified petitioner as matching the description of a robbery suspect. When the officer asked to speak with petitioner and instructed him to put his hands on the police vehicle, petitioner refused and tried to flee on foot. A scuffle ensued, and petitioner was subdued after a backup officer arrived. The officers found a loaded pistol and a bag of marijuana on the ground where petitioner had been. During a search incident to arrest, the

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and 5000 grams) that trigger five- and ten-year mandatory-minimum sentences, see 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii), the 2010 Act lowered the statutory crack-to-powder ratio from 100-to-1 to about 18-to-1.

Pursuant to Section 8 of the 2010 Act, 124 Stat. 2374, the Commission promulgated emergency, temporary amendments to the Guidelines, effective November 1, 2010, that lowered the crack-to-powder ratio in the drug-quantity table, to about 18-to-1. See *Supplement to the 2010 Guidelines Manual* (Nov. 1, 2010). The Commission did not add those amendments to Guidelines § 1B1.10(c), and they are thus not retroactively applicable to previously imposed sentences. (Nor did the 2010 Act make its revisions to the mandatory minimums applicable to offenses committed before its enactment.) The Commission is considering permanent amendments to implement the 2010 Act.

officers found 3.42 grams of crack cocaine, packaged for distribution, in one of petitioner's pockets. J.A. 21a-22a.

a. On January 4, 2005, a grand jury in the Western District of Kentucky returned a superseding indictment charging petitioner with possessing with intent to distribute approximately 3.42 grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (Count 1); possessing approximately 1.6 grams of marijuana, in violation of 21 U.S.C. 844 (Count 2); possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A) (Count 3); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) (Count 4); and related forfeiture counts. J.A. 12a-16a.

b. On April 18, 2005, petitioner executed a written plea agreement "[p]ursuant to Fed. R. Crim. P. 11(c)(1)(C)," in which he agreed to plead guilty to all four counts. J.A. 20a-33a. Petitioner acknowledged "that the charges to which he w[ould] plead guilty carr[ied] a minimum term of imprisonment of five years, [and] a combined maximum term of imprisonment of life." J.A. 23a. Petitioner agreed to forfeit property related to his offense, including the firearm he was carrying at the time of arrest. J.A. 29a-30a. In exchange for petitioner's guilty plea, the government agreed, *inter alia*, "that a sentence of 106 months' incarceration [was] the appropriate disposition of this case." J.A. 26a.

Petitioner's conviction under Section 924(c) (Count 3) carried a mandatory consecutive 60-month sentence. J.A. 27a. With respect to the remaining counts, the plea agreement noted that petitioner's base offense level under the drug-quantity table, was 22 and that he was eligible for a three-level credit for acceptance of responsibility under Guidelines § 3E1.1(a) and (b). J.A. 27a; see

also J.A. 26a (government agreed to recommend reduction for acceptance of responsibility at sentencing). The agreement stated that petitioner's criminal history category under the Guidelines would be "determined upon completion of the presentence investigation," that the parties reserved the right to object to the calculation of petitioner's criminal history, and that the parties "anticipate[d] a Criminal History Category of IV." J.A. 27a-28a. The agreement indicated petitioner's understanding that the district court would "independently calculate the Guidelines at sentencing," and petitioner "agree[d] to have his sentence determined pursuant to the Sentencing Guidelines." J.A. 28a.

The agreement provided that if the district court "refuses to accept this agreement and impose sentence in accordance with its terms pursuant to Fed. R. Crim. P. 11(c)(1)(C), this Agreement will become null and void and neither party shall be bound thereto, and defendant will be allowed to withdraw the plea of guilty." J.A. 31a. It further stated:

> [Petitioner] agrees that the disposition provided for within this Agreement is fair, taking into account all aggravating and mitigating factors. * * * [Petitioner] will not oppose imposition of a sentence incorporating the disposition provided for within this Agreement, nor argue for any other sentence. If [petitioner] argues for any sentence other than the one to which he has agreed, he is in breach of this Agreement. [Petitioner] agrees that the remedy for this breach is that the United States is relieved of its obligation under this Agreement, but [petitioner] may not withdraw his guilty plea because of his breach.

J.A. 32a. Petitioner also agreed to waive the right to appeal his sentence or "contest or collaterally attack" it "pursuant to 28 U.S.C. § 2255 or otherwise." J.A. 28a.

c. On April 18, 2005, the district court accepted petitioner's guilty plea. J.A. 36a-44a. During the change-of-plea hearing, the prosecutor explained that the parties

> have entered into [a] plea agreement pursuant to [Rule] 11(c)(1)(C), and that's important to note because the parties have reviewed the sentencing guidelines as well as the statutory minimums that are at play in this issue, and we have agreed upon a recommended sentence that we will jointly provide to the Court. And if the Court chooses not to accept our plea agreement or not to sentence within our agreement, then [petitioner] will have an opportunity to withdraw his guilty plea and go to trial.

J.A. 41a. The prosecutor further noted that, even though the parties anticipated that petitioner would be found to have a criminal history category of IV, "[t]here may be some issues with that" calculation, and petitioner had preserved "an opportunity to argue to the Court that his criminal history ought to be a [IV]." J.A. 43a. The prosecutor stated that the parties "jointly recommend[ed]" a sentence of 106 months of imprisonment. J.A. 44a. Petitioner and his counsel both confirmed for the judge that the plea agreement called for a 106-month sentence. *Ibid.*

"After complying with Rule 11," the district court "accepted [petitioner's] plea of guilty," entering an order expressly stating that petitioner pleaded guilty "pursuant to a written Rule 11(c)(1)(C) plea agreement." J.A. 35a.

d. The presentence investigation report (PSR) calculated a base offense level of 22 under the drug-quantity table, Guidelines § 2D1.1(c) (2004), and a three-level reduction for acceptance of responsibility, which produced a total offense level of 19. J.A. 110a-113a.

The PSR initially assigned petitioner nine criminal-history points based on eight scored prior convictions. J.A. 113a-128a. Those nine points were reduced to six pursuant to Guidelines § 4A1.1(c), which caps the number of one-point convictions at four. J.A. 128a. The PSR then added two points pursuant to Guidelines § 4A1.1(d), because petitioner committed the offense in this case while under a sentence of probation. J.A. 128a. Based on a total of eight countable criminal-history points, the PSR assigned petitioner a category IV criminal history, which yielded an advisory Guidelines range of 46 to 57 months of imprisonment, in addition to the 60-month mandatory consecutive sentence applicable to Count 3. J.A. 128a, 134a. The PSR noted that "[a]s the plea agreement in this case is pursuant to Rule 11(c)(1)(C), should the court reject the terms of the plea agreement * * * , [petitioner] would be allowed to withdraw his guilty pleas." J.A. 134a.

e. On July 18, 2005, the district court sentenced petitioner. J.A. 45a-51a. At the sentencing hearing, petitioner's counsel informed the court:

> We have no objections [to the PSR]. This is a (C) plea where both the United States and the defense have agreed that a sentence of 106 months would be appropriate. This is within the guideline, the advisory guideline range calculated by the probation officer. The parties would ask the Court to accept the plea agreement.

J.A. 47a. The court sought confirmation that the parties' agreement called for a sentence of 106 months, to which petitioner's counsel responded: "That's correct, your Honor. That's the agreement of the parties." *Ibid*. The court accepted the findings and Guidelines calculations in the PSR and then sentenced petitioner to 106 months of imprisonment, to be followed by five years of supervised release. J.A. 47a-49a. The judgment imposed an assessment of $400, but waived the relevant fine and costs of incarceration "due to [petitioner's] inability to pay." J.A. 59a. The judgment stated that petitioner pleaded guilty "pursuant to a Rule [11](c)(1)(C) plea agreement." J.A. 52a (emphasis omitted).

3. Two years after petitioner's sentence became final, the Sentencing Commission reduced the base offense levels for crack cocaine by two levels and made that amendment retroactively applicable to sentences that had been previously imposed. See p. 6, *supra*. In a general order entered on February 20, 2008, the Chief Judge of the United States District Court for the Western District of Kentucky provided a procedure for reviewing the sentences of "currently-incarcerated individuals that may be subject to reduction" in light of those amendments. See W.D. Ky. Gen. Order. No. 2008-01, http://www.kywd.uscourts.gov/pdf/General Order_2008-01.pdf.

On June 5, 2008, pursuant to that order, the district court directed the Probation Office to prepare a Memorandum of Recalculation in petitioner's case addressing whether Amendment 706 resulted in a lower Guidelines range; ordered the parties to file any objections to that memorandum; and appointed counsel to represent petitioner. J.A. 60a-62a. On August 8, 2008, the Probation Office filed an Amended Memorandum of Recalculation,

in which it determined that the 2007 crack-cocaine amendments resulted in a lower base offense level, a lower adjusted offense level, and a lower advisory Guidelines range than those that it had calculated for the 2005 sentencing. J.A. 149a-150a. The new Guideline Imprisonment Range was 37 to 46 months, J.A. 150a—which, after the addition of the mandatory consecutive sentence of 60 months for the Section 924(c) count, resulted in a range of 97 to 106 months. Nevertheless, the Probation Office concluded that, because "the original sentence was imposed under the terms of a binding Rule 11(c)(1)(C) agreement," no sentence reduction was "authorized." J.A. 150a-151a.[4]

Petitioner filed a written objection, contending in relevant part that a reduction was authorized because "the advisory sentencing ranges for crack cocaine offenses in effect at the time of [his] sentencing most certainly were used—at least in part—to determine his sentence." J.A. 158a. Petitioner noted that the parties had selected the bottom of his then-applicable advisory Guidelines range when they had agreed on a sentence of 106 months of imprisonment, and that the court had considered that range in deciding to accept the plea agreement. *Ibid.*

On December 31, 2008, the district court denied petitioner's request for a sentence reduction. J.A. 66a-69a. The court found that petitioner's "sentence was not based upon a guideline calculation, but rather the 106 months was agreed upon by the parties pursuant to Rule

[4] An earlier Memorandum of Recalculation, filed on May 8, 2008, did not acknowledge the Rule 11(c)(1)(C) basis for petitioner's guilty plea. It thus indicated that petitioner was eligible for a sentence reduction and that, absent an objection by either party, the district court could reduce petitioner's sentence to 97 months. J.A. 143a-144a.

11(c)(1)(C)," in an "agreement 'bind[ing] both the parties and the court.'" J.A. 68a-69a (quoting *United States* v. *Peveler*, 359 F.3d 369, 378 (6th Cir.), cert. denied, 542 U.S. 911 (2004)). In light of its finding that "Amendment 706 has no effect on [petitioner's] sentence," the court held it could not reduce that sentence. J.A. 69a.

4. Petitioner appealed the denial of his request for a sentence reduction. The court of appeals consolidated petitioner's appeal with that of another defendant, Antonio Goins, who had also been denied a reduction under Section 3582(c)(2) in light of a Rule 11(c)(1)(C) plea agreement to a specific sentence. The court affirmed the judgments in both cases. J.A. 70a-92a.

The court of appeals held that its prior decision in *Peveler* "preclude[d] resentencing" in both cases. J.A. 73a. As the court explained, *Peveler* "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." *Ibid.* In so holding, *Peveler* had relied on the Tenth Circuit's reasoning in *United States* v. *Trujeque*, 100 F.3d 869 (1996), that such a "defendant's sentence [i]s not actually calculated under the guidelines, but [i]s determined by the Rule 11([c])(1)(C) plea agreement," *Peveler*, 359 F.3d at 378 (citing *Trujeque*, 100 F.3d at 871), and had also recognized that a type C agreement "binds both the parties and the court," *ibid.*

The court of appeals noted that *Peveler* did "not preclude reducing the sentence of a defendant who ple[aded] under Rule 11(c)(1)(C) where resentencing is necessary to avoid a miscarriage of justice," but it concluded that "neither Goins nor [petitioner] falls within that exception." J.A. 74a. Petitioner's "original 106-

month sentence remained inside the Guidelines range for his crime, even after the amendment" to the crack-cocaine Guidelines, which was "a situation that the *Peveler* court contemplated and determined did not overcome the general prohibition on resentencing." J.A. 75a (citing *Peveler*, 359 F.3d at 379 n.4).[5]

In a concurring opinion (J.A. 76a-92a), Judge White stated that "*Peveler* construes 18 U.S.C. § 3582(c)(2) more narrowly than Congress intended." J.A. 76a. In her view, "[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. According to Judge White, "[w]hen faced with a § 3582[(c)](2) motion in the context of a Rule 11(c)(1)(C) agreement, the court should be able to evaluate the agreement and the surrounding circumstances to determine whether the sentence was based at least in part on a subsequently reduced Guidelines range, and if so, whether and to what extent it should be reduced." J.A. 88a-89a. "Were it not for *Peveler*," Judge White would have remanded both cases "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.

[5] As to Goins, the court of appeals explained that his agreed-upon sentence (168 months) exceeded his pre-amendment range (138 to 157 months). J.A. 74a. The court further explained that Goins had "entered into a carefully constructed agreement in which the parties balanced many factors—including the charges to which Goins would plead guilty, the charges which the Government would move to dismiss, and the amount of drugs for which Goins would be held responsible." *Ibid.* Because "[n]othing in th[e] record suggest[ed] that declining to resentence Goins work[ed] any injustice," the court concluded that "[t]he district court did not err by holding Goins to the bargain he made." J.A. 75a.

On January 12, 2010, the court of appeals denied petitions for rehearing en banc filed by petitioner and Goins. J.A. 93a-94a.

SUMMARY OF ARGUMENT

A defendant who pleads guilty in exchange for a specific sentence or sentencing range pursuant to an agreement entered into under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), because such a sentence is not "based on" a subsequently lowered Guidelines range.

A. Finality is an important attribute of criminal judgments. Section 3582(c)(2) represents a narrow exception to the general rule of sentence finality by permitting a district court to "reduce the term of imprisonment" of a defendant who had been "sentenced to a term of imprisonment *based on* a sentencing range that has been subsequently lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2) (emphasis added).

B. A defendant who pleads guilty pursuant to a specific-sentence agreement under Rule 11(c)(1)(C) does not satisfy the condition precedent for Section 3582(c)(2) relief. A sentence is not "based on" whatever ultimately led to its imposition, but is, more logically, based on the element that was of binding legal consequence in its imposition—that which entitled the defendant to receive the specific sentence he had negotiated with the government. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358 (1993). When a defendant pleads guilty pursuant to Rule 11(c)(1)(C), the parties' sentencing agreement binds the district court once it accepts the plea agreement, whether or not the stipulated sentence or sentencing range correlates to the defendant's applicable Guide-

lines range. The court, therefore, imposes sentence "based on" the plea agreement, not on the defendant's Guidelines range.

That reading is consistent with the Sentencing Commission's implementation of Section 3582(c)(2). The policy statement in Guidelines § 1B1.10(b)(1)—the terms of which must be satisfied before a district court may exercise discretion to reduce a previously imposed sentence—allows a reduction only to account for a guideline provision that was "applied when the defendant was sentenced." But when a defendant is sentenced pursuant to a Rule 11(c)(1)(C) agreement to a specific sentence, the Guidelines are not "applied" at sentencing with respect to that component of the sentence.

The absence of an express prohibition on future sentence reductions in Rule 11(c)(1)(C) does not alter that conclusion. The language of Section 3582(c)(2) focuses on the basis for the original sentence. When Congress enacted Section 3582(c)(2), type C agreements were already treated as binding on courts; because Congress is presumed to understand the state of the law when it legislates, its decision to limit Section 3582(c)(2) to sentences that were "based on" a subsequently lowered Guidelines range was significant.

Nor does the parties' and the district court's consultation of the Guidelines during the plea and sentencing process mean that a specific sentence in a Rule 11(c)(1)(C) plea agreement is "based on" the Guidelines for purposes of Section 3582(c)(2). The Guidelines will typically inform the parties' negotiation of a plea agreement, and the district court generally will (and should) consider the Guidelines in deciding whether to accept the plea agreement in the first instance. See Guidelines § 6B1.2(c), p.s. But the court may accept an agreement

even if its stipulated sentence falls outside the defendant's likely Guidelines range. It is the parties' agreement, once accepted, that provides the basis for the sentence.

The district court and the court of appeals, therefore, were correct to conclude that petitioner is not eligible for a sentence reduction as a result of the Sentencing Commission's 2007 crack-cocaine Guidelines amendments. The plea and sentencing records leave no doubt that petitioner pleaded guilty in exchange for a 106-month sentence pursuant to an agreement under Rule 11(c)(1)(C). Because the district court accepted the plea agreement, that agreement was the basis for petitioner's sentence.

C. Plea agreements are an essential component of the administration of justice and result from the mutual advantage to the defendant and the government in resolving a case without trial. The government often agrees to give up the right to seek a higher sentence or agrees to dismiss some charges in exchange for a defendant's agreement to a fixed sentence. Construing Section 3582(c)(2) to preclude a Rule 11(c)(1)(C) defendant from obtaining a sentence reduction preserves the contractual bargain struck by the parties in their plea agreement and prevents the defendant from obtaining an additional and unwarranted sentencing benefit at the government's expense.

In this case, petitioner benefitted from his plea agreement because he obtained the certainty of a 106-month sentence in the face of a lengthy criminal record that, in the absence of his plea agreement, could have resulted in a greater sentence. The terms of the parties' binding agreement would be negated if petitioner were now to receive a sentence reduction.

Recognizing the binding effect of an agreement in determining Section 3582(c)(2) eligibility does not mean that either the agreement or Rule 11(c)(1)(C) trumps the statute. Rather, the binding nature of type C agreements gives content to the statutory inquiry into whether the sentence was "based on" a subsequently lowered Guidelines range. The waiver principles on which petitioner extensively relies are therefore inapposite. Because a Rule 11(c)(1)(C) defendant's sentence is "based on" his plea agreement, no waivable right under Section 3582(c)(2) exists in the first place. Conversely, the absence of similar language in Section 3582(c)(1) and Rule 35(b) of the Federal Rules of Criminal Procedure means that a Rule 11(c)(1)(C) defendant may still receive a sentence reduction under those provisions. Moreover, such reductions are (unlike those under Section 3582(c)(2)) sought by the government rather than the defendant.

The benefits obtained by a defendant who pleads guilty pursuant to a type C agreement will often be equivalent to, or even exceed, the sentence reduction he could receive under Section 3582(c)(2). A defendant assumes the risk of a favorable change in the law when he pleads guilty. Thus, construing Section 3582(c)(2) to preclude sentence reductions for a defendant who pleaded guilty in exchange for a specific sentence or sentencing range appropriately preserves the terms of the parties' bargain and works no injustice.

ARGUMENT

A DEFENDANT WHO PLEADS GUILTY IN EXCHANGE FOR A SPECIFIC SENTENCE PURSUANT TO A RULE 11(c)(1)(C) AGREEMENT IS NOT ELIGIBLE FOR A SENTENCE REDUCTION UNDER 18 U.S.C. 3582(c)(2) BECAUSE THE SENTENCE IS NOT "BASED ON" A GUIDELINES RANGE

A. Section 3582(c)(2) Represents A Narrow Exception To The Rule That A Sentence Of Imprisonment May Not Be Modified

As this Court has repeatedly recognized, finality is an "essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); see *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments."). Once a district court has pronounced sentence and the sentence becomes final, the court may not alter that sentence except as Congress allows. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 189 & n.16 (1979).

Consistent with those principles, Congress has provided that a court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). That command is subject to three narrow exceptions, collectively designed to serve as "safety valves" for prisoners serving already-imposed sentences. S. Rep. No. 225, 98th Cong., 1st Sess. 121 (1983) (*1983 Senate Report*). The exception at issue in this case provides that a court "may reduce the term of imprisonment" of a defendant who was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

18 U.S.C. 3582(c)(2).[6] Before granting such a reduction, the court must consider the statutory sentencing factors set out in 18 U.S.C. 3553(a) "to the extent that they are applicable." 18 U.S.C. 3582(c)(2). The statute also instructs that such a reduction cannot be granted unless it "is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.* As the Court observed in *Dillon* v. *United States*, 130 S. Ct. 2683 (2010): "Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Id.* at 2691. As a result, Section 3582(c)(2) "permits" a court to reduce a sentence only "within the narrow bounds established by the [Sentencing] Commission." *Id.* at 2694.

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[6] The other two exceptions are contained in 18 U.S.C. 3582(c)(1) and must be initiated by the government. Under one of those exceptions, a court may reduce an imposed term of imprisonment on the motion of the Director of the Bureau of Prisons, if "extraordinary and compelling reasons warrant such a reduction" or the defendant is, *inter alia*, at least 70 years old and has served at least 30 years in prison, provided that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(A). That exception applies "to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner." *1983 Senate Report* 121.

Under the other exception, a 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." 18 U.S.C. 3582(c)(1)(B). Rule 35, among other things, permits a district court, on the government's motion, to reduce a sentence if, after sentencing, the defendant "provided substantial assistance in investigating or prosecuting another person." Fed. R. Crim. P. 35(b)(1).

B. A Defendant Who Pleads Guilty In Exchange For A Specific Sentence Pursuant To A Rule 11(c)(1)(C) Plea Agreement Is Not Sentenced "Based On" A Guidelines Range

The exception to sentence finality in Section 3582(c)(2) does not apply to a defendant who pleaded guilty in exchange for a specific sentence or sentencing range pursuant to a Rule 11(c)(1)(C) plea agreement. That conclusion is dictated by the plain language of Section 3582(c)(2) and the nature of that kind of plea agreement. Once a court accepts a plea agreement under Rule 11(c)(1)(C), it is bound by the parties' stipulation of a particular sentence or sentencing range. As a result, in such a case, the court imposes a sentence "based on" the parties' agreement—not on any advisory Guidelines range that might otherwise apply.

Petitioner's contrary view has been adopted by only a single federal court of appeals.[7] The great majority of the circuits to have considered the question have held that Section 3582(c)(2) generally does not permit a district court to reduce a sentence that was imposed pursuant to a Rule 11(c)(1)(C) plea agreement.[8]

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[7] See *United States* v. *Cobb*, 584 F.3d 979, 984 (10th Cir. 2009) ("[N]othing in the language of § 3582(c)(2) or language of Rule 11 precludes a defendant who pleads guilty under Rule 11 [in exchange for a specific sentence] from later benefitting from a favorable retroactive guideline adjustment."); cf. *United States* v. *Dews*, 551 F.3d 204, 209-212 (4th Cir. 2008) (panel opinion adopting similar view), vacated on grant of reh'g en banc, No. 08-6458 (4th Cir. Feb. 20, 2009), dismissed as moot (4th Cir. May 4, 2009).

[8] See *United States* v. *Rivera-Martínez*, 607 F.3d 283, 286-287 (1st Cir. 2010), petition for cert. pending, No. 10-113 (filed July 19, 2010); *United States* v. *Main*, 579 F.3d 200, 203-204 (2d Cir. 2009), cert. denied, 130 S. Ct. 1106 (2010); *United States* v. *Sanchez*, 562 F.3d 275,

1. A sentence is "based on" a Guidelines range only when that range is of legal consequence to the sentence's validity

"When interpreting a statute," the Court "give[s] words their ordinary or natural meaning." *Pasquantino* v. *United States*, 544 U.S. 349, 356 (2005) (quoting *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004)); see also, *e.g.*, *Flores-Figueroa* v. *United States*, 129 S. Ct. 1886, 1891

279-282 (3d Cir. 2009), cert. denied, 130 S. Ct. 1053 (2010); *United States* v. *Peveler*, 359 F.3d 369, 378-379 (6th Cir.), cert. denied, 542 U.S. 911 (2004); *United States* v. *Franklin*, 600 F.3d 893, 896 (7th Cir. 2010); *United States* v. *Scurlark*, 560 F.3d 839, 841-842 (8th Cir.), cert. denied, 130 S. Ct. 738 (2009); cf. *United States* v. *Bride*, 581 F.3d 888, 890-891 (9th Cir. 2009) (defendant ineligible for Section 3582(c)(2) relief where Rule 11(c)(1)(C) plea agreement provided for sentence below Guidelines range as calculated by district court), cert. denied, 130 S. Ct. 1160 (2010); see also *United States* v. *Berry*, 618 F.3d 13, 17 (D.C. Cir. 2010) (reserving question of "in what circumstances, if any, a defendant who enters a Rule 11(c)(1)(C) plea agreement is sentenced 'based on' a particular sentencing range"); *id.* at 19 (Rogers, J., concurring in judgment) (concluding that defendant was not sentenced "based on" a Guidelines range "where the district court has calculated a guideline sentencing range and then departed from it and imposed a sentence based on the term of imprisonment set forth in the plea agreement"). The First and Seventh Circuits have held open the possibility of a reduction when a plea agreement "contains an express statement," *Rivera-Martínez*, 607 F.3d at 287, or "*clearly* reflect[s]" the intent of the parties, *United States* v. *Ray*, 598 F.3d 407, 409 (7th Cir. 2010), to tie the stipulated sentence to a Guidelines calculation affected by the retroactive amendment. The Sixth Circuit has articulated an exception when a reduction would be necessary to avoid a miscarriage of justice, see *Peveler*, 359 F.3d at 378 n.4. The Fifth Circuit has held, in a case where a type C agreement established a minimum sentence but left the ultimate sentence to the district court, that the defendant was eligible for a reduction under Section 3582(c)(2) as long as it did not go below the agreement's stipulated minimum. *United States* v. *Garcia*, 606 F.3d 209, 210-214 (2010).

(2009) (noting that "courts ordinarily interpret criminal statutes" in a manner "fully consistent with * * * ordinary English usage"). As relevant here, the verb phrase to "base on" or to "base upon" means "to use as a base or basis for," and the noun "base" means "the fundamental part of something : basic principle." *Webster's Third New International Dictionary of the English Language* 180 (1981) (definition 2 of verb "base"; definition 3a of noun "base"); see *The American Heritage Dictionary of the English Langauge* 148 (4th ed. 2006) (definition 4 of noun "base": "[t]he fundamental principle or underlying concept of a system or theory"); 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (definition 2.a of noun "base": "*fig[urative]* Fundamental principle, foundation, groundwork"; sense II of noun "base": "The main or most important element or ingredient, looked upon as its fundamental part"); *Webster's New International Dictionary of the English Language* 225 (2d ed. 1958) (definition 4.a of "base": "[t]he main or chief ingredient of anything, viewed as its fundamental element or constituent").

As petitioner recognizes (Br. 16), this Court construed the phrase "based upon" in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993). That case, however, does not support petitioner's expansive reading of "based on" for purposes of Section 3582(c)(2). In *Nelson*, the Court considered a clause in the Foreign Sovereign Immunities Act of 1976 permitting suit against a foreign state when "the action is based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2). The plaintiffs were a husband and wife who sued Saudi Arabia and its state-owned hospital for intentional and negligent torts committed against the husband, allegedly in retaliation for his reporting

safety hazards at the hospital where he had worked (in Saudi Arabia) after being recruited and hired (in the United States) by the defendants. 507 U.S. at 352-354.

With respect to the requirement that the plaintiffs' action be "based upon" commercial activity in the United States, the Court stated

> Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assurance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.

Nelson, 507 U.S. at 357 (internal citations omitted). Applying that "most natural[]" reading of the phrase, the Court rejected the plaintiffs' argument that their suit was "based upon" the defendants' activities in recruiting and employing the husband and also upon their later wrongful acts. It was not enough that the recruiting and hiring activities were "connect[ed] with" or "led to the conduct that eventually injured [the plaintiffs]." *Id.* at 358. Instead, the Court held that the plaintiffs' suit was exclusively "based upon" the tortious acts committed in Saudi Arabia, and not upon recruiting and hiring "activities that preceded the[] [torts'] commission." *Ibid.* As the Court explained, the suit could not be "based upon" the defendants' earlier activities because "those facts alone entitle the [plaintiffs] to nothing." *Ibid.*

The Court's discussion in *Nelson* establishes that a claim is not "based on" something simply because it is a but-for cause or because it "led to" the critical or consequential act. 507 U.S. at 354, 358. Instead, consistent

with the definitions quoted above, a claim is "based on" its "fundamental" or "most important" elements—those that actually entitle the plaintiff to something. See *Federal Ins. Co.* v. *Richard I. Rubin & Co.*, 12 F.3d 1270, 1288 (3d Cir. 1993) ("The Court [in *Nelson*] interpreted the term 'based upon' to require the plaintiff's lawsuit to involve a claim that *materially results* from conduct that constitutes the defendant's commercial activity in the United States.") (emphasis added), cert. denied, 511 U.S. 1107 (1994).

Reading the phrase "based on" to refer to that which is legally binding is consistent with *Nelson* and the dictionary definitions quoted above, but those sources lend scant support to petitioner's permissive construction, which extends, in his words, to something that is merely a "point of development" or "the starting point and initial benchmark" for negotiations that later lead to an agreement. Pet. Br. 17, 31.

Petitioner's view also contradicts the construction of "based on" that courts have adopted in a closely analogous context involving the ability to revisit an earlier civil judgment. Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, a district court may provide relief from a final judgment when that judgment "is based on an earlier judgment that has been reversed or vacated." Courts have consistently recognized the narrow nature of that authorization, concluding that it "is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion. It does not apply merely because a case relied on as precedent * * * has since been reversed." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2863, at 335 (2d ed. 1995) (citing cases); see

also, *e.g.*, *Manzanares* v. *City of Albuquerque*, No. 10-2011, 2010 WL 5116912, at *2 (10th Cir. Dec. 16, 2010).[9]

Thus, in the context of Section 3582(c), a sentence is not properly said to be "based on" whatever ultimately "led to" its imposition (*Nelson*, 507 U.S. at 358), but is, more narrowly, based on the element that was of binding legal consequence in its imposition—that which "entitle[d]" the defendant (*ibid.*) to the particular sentence.

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[9] In other contexts—not involving the potential modification of a civil or criminal judgment—courts have construed "based on" in a range of ways. For example, in the context of a Clean Air Act provision requiring an attainment demonstration to be "based on photochemical grid modeling," 42 U.S.C. 7511a(c)(2)(A), courts have found the phrase "based on" to be ambiguous but have upheld as reasonable the EPA's conclusion that a demonstration is "based on the grid model" when the model's "results form[ed] the principal component of the analysis" and those results were "adjust[ed] * * * with supplemental information." *Environmental Def.* v. *United States EPA*, 369 F.3d 193, 204-205 (2d Cir. 2004); accord *Sierra Club* v. *EPA*, 356 F.3d 296, 305-306 (D.C. Cir. 2004). In the context of a since-amended provision of the False Claims Act that precluded jurisdiction over a *qui tam* action "based upon the public disclosure of allegations," 31 U.S.C. 3730(e)(4)(A) (2006) (amended 2010), the courts of appeals divided about the meaning of the phrase "based upon," with the majority holding that "as long as the relator's allegations are substantially similar to information disclosed publicly, the relator's claim is 'based upon' the public disclosure even if he actually obtained his information from a different source," and the minority "requiring proof that the relator's allegations are actually derived from the publicly disclosed information." *United States ex rel. Ondis* v. *City of Woonsocket*, 587 F.3d 49, 57 (1st Cir. 2009) (citing cases). In the context of a reference in the Tariff Schedules of the United States to an "[a]pparatus based on the use of radiations from radioactive substances," the U.S. Court of Customs and Patent Appeals concluded that the "plain meaning" of Congress's use of "the 'based on' language" was limited to "goods in which the use of radiation is a *fundamental and essential component*." *United States* v. *Siemens Am., Inc.*, 653 F.2d 471, 474, 476 (1981), cert. denied, 454 U.S. 1150 (1982) (emphasis added).

In many cases, sentences are indeed "based on" the advisory Guidelines ranges that sentencing judges applied when they imposed those sentences. But, as discussed below, that is not true when a sentence is the direct product of the parties' agreement to a specific sentence, as provided for in Rule 11(c)(1)(C), rather than an application of the Guidelines.

2. The sentence of a defendant who pleads guilty under Rule 11(c)(1)(C) is the legal consequence of the plea agreement, not of any Guidelines range

When a defendant pleads guilty in exchange for a specific sentence pursuant to Rule 11(c)(1)(C), his sentence is the legal consequence of the parties' agreement on a specific sentence or sentencing range because, once accepted, that agreement—not the Sentencing Guidelines—is what binds the district court to impose the sentence. Accordingly, such a defendant's sentence is "based on" the plea agreement rather than any Guidelines range.

a. Under Rule 11(c)(1)(C), a defendant and the government may agree in a plea agreement "that a specific sentence or sentencing range is the appropriate disposition of the case," and "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Rule 11(c)(4) further provides that "[i]f the court accepts the plea agreement, * * * the agreed disposition will be included in the judgment." The district court thus has no authority to modify the parties' sentencing agreement once it accepts that kind of plea agreement. See Fed. R. Crim. P. 11(c)(1)(C), (c)(3)(A) and (c)(4); see, *e.g.*, *United States* v. *Rivera-Martínez*, 607 F.3d 283, 286 (1st Cir. 2010) ("Once the district court accepts a C-type plea

agreement, the court is obliged to sentence the defendant in strict conformity with the terms of the agreement."), petition for cert. pending, No. 10-113 (filed July 19, 2010); *United States* v. *Pacheco-Navarette*, 432 F.3d 967, 971 (9th Cir. 2005) ("[T]he district court is not permitted to deviate from * * * sentences stipulated in [Rule 11(c)(1)(C)] agreements."), cert. denied, 549 U.S. 892 (2006). Unlike, for example, plea agreements under Rule 11(b)(1)(B), in which the government agrees to make a non-binding sentence recommendation or agrees not to oppose a defendant's sentencing request, the parties' stipulation to a specific sentence or sentencing range in a type C agreement is so critical that the defendant may withdraw his guilty plea if the court does not accept the parties' sentencing stipulation. See Fed. R. Crim. P. 11(c)(5)(B); see also Fed. R. Crim. P. 11 advisory committee's note (1979 Amendment) ("critical to a type * * * (C) agreement is that the defendant receive the * * * agreed-to sentence"). Accordingly, where the parties have agreed on a sentence or sentencing range in a Rule 11(c)(1)(C) plea agreement, that agreement is the legal determinant of the sentence, regardless of whether the sentence correlates with what would have been the applicable Guidelines range.

b. Petitioner contends (Br. 25-26) that "Rule 11(c)(1)(C) contains no hint of a prohibition on future sentence reductions under § 3582(c)(2)," because it requires only that the court initially "*impose* a sentence according to the parties' recommendation." But the predicate for a reduction under Section 3582(c)(2)—*i.e.*, whether the defendant's sentence was "based on" a subsequently lowered Guidelines range—focuses on what happened at the original sentencing. The absence of a

provision in Rule 11(c)(1)(C) regarding *future* sentence reductions is not relevant to that analysis.

When Congress enacted the SRA in 1984, Rule 11 already provided that, if a district court rejects a type C agreement, it must "afford the defendant the opportunity to then withdraw the plea," Fed. R. Crim. P. 11(e)(4) (1984), and, "[i]f the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement," Fed. R. Crim. P. 11(e)(3) (1984). At that time, courts generally treated the sentencing disposition provided for in type C agreements as binding once the district court accepted the agreement. See, *e.g.*, *United States* v. *French*, 719 F.2d 387, 389 & n.2 (11th Cir. 1983), cert. denied, 466 U.S. 960 (1984); *United States* v. *Thompson*, 680 F.2d 1145, 1150 (7th Cir.), cert. denied, 459 U.S. 1089 (1982), and 459 U.S. 1108 (1983); *United States* v. *Stevens*, 548 F.2d 1360, 1362 (9th Cir.), cert. denied, 430 U.S. 975 (1977); see also Pet. Br. 17 n.3. In light of the "well-settled presumption that Congress understands the state of existing law when it legislates," *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988), Congress knew when it enacted Section 3582(c)(2) that a court would be required to impose the sentence to which the parties had stipulated (unless the court had rejected the agreement and given the defendant an opportunity to withdraw the plea).

Congress could have written Section 3582(c)(2) to cover defendants who agreed to specific sentences under Rule 11(c)(1)(C). For example, it could have made Section 3582(c)(2) applicable to any "defendant whose underlying sentencing range was subsequently lowered by the Sentencing Commission, whether or not that range was applied at sentencing." Congress instead limited

sentence reductions to sentences "based on" a Guidelines range that was later amended. That choice is significant given Congress's knowledge that a stipulated sentence—regardless of whether it corresponds to or departs from what would otherwise have been the relevant Guidelines range—binds the sentencing court once it accepts a plea agreement under Rule 11(c)(1)(C).[10]

[10] The only provision in the United States Code that mentions Rule 11(c)(1)(C) plea agreements is 18 U.S.C. 3742, which prescribes when a sentence can be reviewed on appeal. Section 3742 generally permits an appeal to be brought when a sentence is greater than or less than "the sentence specified in the applicable guideline range," 18 U.S.C. 3742(a)(3) and (b)(3), or when a sentence is "plainly unreasonable" and there is "no sentencing guideline" for the offense, 18 U.S.C. 3742(a)(4) and (b)(4). But both of those kinds of appeals are expressly foreclosed "[i]n the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure" unless the sentence is also different from "the sentence set forth in such agreement." 18 U.S.C. 3742(c)(1) and (2); see note 1, *supra* (explaining that the substance of Rule 11(c)(1)(C) used to be located at (e)(1)(C)). Although Section 3742(c), which addresses type C plea agreements, does not also limit the ability to bring an appeal on the separate ground that a sentence "was imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. 3742(a)(2) and (b)(2), such a limitation was unnecessary because the sentence in such a case is the result of the parties' agreement, which binds the district court, and not of any "application" of the Guidelines at the time of sentencing. Thus, the legislative history recognizes that, although Section 3742 "create[d] for the first time a comprehensive system of [appellate] review of sentences," it did not change the fundamental proposition that "[o]f course, a sentence consistent with a plea agreement cannot be appealed." *1983 Senate Report* 153, 155. Moreover, even if the sentence specified in a Rule 11(c)(1)(C) agreement and then imposed by a court could somehow be said to be the result of an "application" of the Guidelines, petitioner still could not claim that his sentence was imposed as a result of an "incorrect" application of the Guidelines, because the sentencing court correctly applied the drug-quantity Guideline that was applicable when his sentence was imposed in 2005, and this Court has explained that the

c. Petitioner's more capacious reading of Section 3582(c)(2) is also inconsistent with the Sentencing Commission's implementation of that statute. As *Dillon* explained, Section 3582(c)(2) requires a district court evaluating a request to reduce a sentence "to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification." 130 S. Ct. at 2691; see 18 U.S.C. 3582(c)(2) (requiring any sentence reduction to be "consistent with applicable policy statements issued by the Sentencing Commission"). Under those instructions, a court is permitted to "substitute only" those retroactively amended provisions that "correspond[]" to the "guideline provisions that were *applied when the defendant was sentenced*," and the court must "leave all other guideline application decisions unaffected." *Ibid*. (quoting Guidelines § 1B1.10(b)(1), p.s.) (emphasis added). In other words, the Commission has plainly stated that the sentence-modification power extends only to the parts of the Guidelines that "were applied when the defendant was sentenced."

When a defendant is sentenced pursuant to a type C plea agreement to a specific sentence, however, there is no "appli[cation]" of the Guidelines at the time of sentencing with respect to that component of the sentence. By the time the sentencing occurs (*i.e.*, the time that is relevant under Guidelines § 1B1.10(b)(1)), the district court has already accepted the plea agreement. The court does not "appl[y]" the Guidelines at that point but instead imposes the specific sentence to which the parties had agreed—because that sentence, by the express

court's later refusal to reduce petitioner's sentence under Section 3582(c)(2) did not involve a "sentencing or resentencing," but only the possibility of "a limited adjustment to an otherwise final sentence" that had been previously imposed. *Dillon*, 130 S. Ct. at 2690-2691.

terms of Rule 11(c)(1)(C), "binds the court" after it accepts the guilty plea. Although petitioner repeatedly discusses whether his 106-month sentence was "based on" the Guidelines, he does not (and could not plausibly) argue that the later-amended crack guideline was actually "applied when [he] was sentenced." Guidelines § 1B1.10, the terms of which must be satisfied before a district court may exercise discretion to reduce a previously imposed sentence, requires there to have been such an application.

d. Petitioner is, accordingly, misguided in focusing on (Br. 21) the concededly strong likelihood that the parties will have calculated and considered potential Guidelines ranges in the course of negotiating a plea agreement and selecting a specific sentence or sentencing range that the district court will be bound to apply. The defendant and the government will typically consult the Sentencing Guidelines to inform their plea negotiations. See Guidelines Ch. 1, Pt. A, Subpt. 1, intro. comment. (n.4(c)) (noting that the prosecutor and defense attorney do not "work in the dark" when they explore "the possibility of a negotiated plea" because "the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place"). But, as the Third Circuit has explained, the parties' "background negotiations" are not relevant to answering "what is the sentence based on" because "the answer depends on what happened in court"; the language of Section 3582(c)(2) focuses on what the district court "considered in sentencing the defendant," and, in the context of a binding agreement under Rule 11(c)(1)(C), the court considers the parties' stipulated sentence or sentencing range. *United States* v. *Sanchez*, 562 F.3d 275, 282 (2009), cert. denied, 130 S. Ct. 1053 (2010).

Although a district court generally considers the applicable Guidelines range in determining whether to accept a Rule 11(c)(1)(C) plea agreement, see Guidelines § 6B1.2(c), p.s., and in imposing a sentence, see 18 U.S.C. 3553(a)(4), that does not mean that the defendant is sentenced "based on" the Guidelines range. See *Rivera-Martínez*, 607 F.3d at 286 ("It is common practice that, in determining whether to accept or reject the sentence proposed in a C-type plea agreement, a district court will use the guidelines as a point of comparison. But taking such a precautionary step does not transmogrify an agreement-based sentence into one based on the guidelines."); *United States* v. *Cieslowski*, 410 F.3d 353, 364 (7th Cir. 2005) ("A sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea."), cert. denied, 546 U.S. 1097 (2006); see also *United States* v. *Cobb*, 584 F.3d 979, 987 (10th Cir. 2009) (Hartz, J., dissenting) (noting that "it will be a rare sentence indeed that is arrived at without any of the essential parties taking the guidelines into consideration"). The court may choose to accept a sentence or range specified by the parties' agreement, even if the sentence or range diverges from the court's calculation of the applicable Guidelines range. See Guidelines § 6B1.2(c), p.s.; see also *United States* v. *Bernard*, 373 F.3d 339, 343-347 (3d Cir. 2004) (rejecting defendant's challenge to correctness of stipulated Guidelines range in type C agreement because district court was under obligation to apply stipulated Guidelines provision once it accepted agreement). The sentence, in short, is not the legal consequence of the defendant's Guidelines range. See *Nelson*, 507 U.S. at 357. It is the parties'

agreement to the particular sentence or range, once accepted, that becomes the basis for that aspect of the sentence.

e. The parties' agreement to a specific sentence or range under Rule 11(c)(1)(C) will prevent that aspect of the sentence from being "based on" a Guidelines range, but there are two general exceptions to that conclusion. First, Rule 11(c)(1)(C) contemplates not only that the parties may agree on a "specific sentence" but also that they may agree that "a particular provision of the Sentencing Guidelines * * * does or does not apply." An agreement that a Guidelines provision *does* apply, without any accompanying agreement to a specific sentence, would not preclude the resulting sentence from being "based (in part) on" that Guidelines provision. Second, when the parties agree upon a "specific sentence," their agreement may address only some aspects of the sentence, and thus will not bind the district court with respect to aspects that it does not address. For instance, the parties may stipulate (as they did here) to a particular term of imprisonment, but not also stipulate to such items as the length and conditions of any term of supervised release, or to restitution, fines, assessments, and forfeitures. In the absence of agreements binding the sentencing court with respect to such items, the court would apply the relevant advisory Guidelines provisions. See Guidelines §§ 5D1.1, 5D1.2, 5D1.3, 5E1.1, 5E1.2, 5E1.3, 5E1.4.[11]

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[11] Although it would be fair to say that the non-imprisonment aspects of the sentence that were not the subject of a Rule 11(c)(1)(C) agreement were indeed "based on" the Guidelines, that would not affect eligibility for a sentence reduction under Section 3582(c)(2). Under the statute and the Commission's policy statement, with one limited exception, the only aspect of a sentence that can be reduced on the basis of a

3. Petitioner's term of imprisonment was "based on" his plea agreement, not on a Guidelines range

a. Petitioner contends (Br. 21) that his term of imprisonment was "based on" on the drug-quantity range prescribed by the Sentencing Guidelines because "the subsequently lowered guideline range was the very foundation of the plea agreement, the court's acceptance of that agreement, and the sentence imposed."[12] In fact, the plea agreement, the plea transcript, the PSR, the sentencing transcript, and the judgment confirm that petitioner's term of imprisonment was based on his plea agreement, not on a Guidelines range.

The plea agreement states that it was executed "[p]ursuant to Fed. R. Crim. P. 11(c)(1)(C)" and that the government "agree[s] that a sentence of 106 months' incarceration is the appropriate disposition of this case." J.A. 20a, 26a. It further states that, if the district court

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retroactively applicable Guidelines amendment is the "term of imprisonment." 18 U.S.C. 3582(c)(2); Guidelines § 1B1.10(a)(1) and (b), p.s. The limited exception is that, in some circumstances, the court may, in light of an amended guideline range, be able to consider "early termination of a term of supervised release." *Id.* § 1B1.10, comment. (n.4(B)).

[12] Petitioner claims to offer a "case-by-case" approach to determining a Rule 11(c)(1)(C) defendant's eligibility for Section 3582(c)(2) relief. Pet. Br. 11, 22, 30, 33. In practice, however, his approach is even more categorical than the government's. His reading of "based on" would sweep in "*all* sentencing decisions," because, he claims, in "actual practice," the Guidelines are "the starting point and initial benchmark for plea negotiations." *Id.* at 30-31 (emphasis added). Although he says at one point that "not every sentence reflected in a C plea agreement is 'based on' the applicable guideline range," *id.* at 33, he provides no instance in which he acknowledges that that would be true under his elastic reading of "based on." Rather, he specifically contends that a sentence "below the guideline range can be 'based on' the guideline range." *Id.* at 32.

"refuses to accept this agreement and impose sentence in accordance with its terms pursuant to Fed. R. Crim. P. 11(c)(1)(C), this Agreement will become null and void and neither party shall be bound thereto, and [petitioner] will be allowed to withdraw the plea of guilty." J.A. 31a.[13]

At the change-of-plea hearing, the prosecutor noted it was "important" that the plea agreement had been entered into pursuant to Rule 11(c)(1)(C), and, as confirmed by petitioner and his counsel, stated that the parties had agreed upon a 106-month sentence. J.A. 41a, 43a-44a. The district court's order stated that petitioner had pleaded guilty "pursuant to a written Rule 11(c)(1)(C) plea agreement." J.A. 35a.

The PSR, after calculating petitioner's Guidelines range, stated that "[a]s the plea agreement in this case is pursuant to Rule 11(c)(1)(C), should the court reject the terms of the plea agreement * * * , [petitioner] would be allowed to withdraw his guilty pleas." J.A.

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[13] Petitioner briefly suggests (Br. 26 n.7) that his "plea agreement is ambiguous as to whether it was actually binding on the court." But petitioner did not raise that argument in his certiorari petition (or in the court of appeals), and it is not fairly included in the question presented in the petition, which was predicated on the understanding that the "district court accepted a Rule 11(c)(1)(C) plea agreement" and that such an agreement "'binds the court.'" Pet. i (quoting Fed. R. Crim. P. 11(c)(1)(C)). See *Wood* v. *Allen*, 130 S. Ct. 841, 851 (2010) (refusing to decide a question not fairly included in the question presented). In any event, the argument lacks merit because the agreement expressly invokes Rule 11(c)(1)(C), see J.A. 20a, 31a, which, in turn, provides that the parties' sentencing stipulation "binds the court once it accepts the plea agreement," Fed. R. Crim. P. 11(c)(1)(C). The agreement also states that, if the district court does not impose sentence in accordance with its terms, the agreement will be "void" and petitioner "will be allowed to withdraw the plea of guilty." J.A. 31a. Those provisions show that the agreement was binding on the court once accepted.

134a. At sentencing, petitioner's counsel reminded the court that the parties had entered into a type C agreement for a stipulated sentence of 106 months, see J.A. 47a, and the court went on to impose that sentence after confirming the parties' agreement and adopting the findings and calculations in the PSR, see J.A. 47a-49a. The judgment specifically stated that petitioner had pleaded guilty "pursuant to a Rule [11](c)(1)(C) agreement." J.A. 52a (emphasis omitted).

In short, at every stage of the plea and sentencing process, the parties, the district court, and Probation Office recognized that petitioner was pleading guilty pursuant to Rule 11(c)(1)(C) and that, if accepted, the plea agreement would require the imposition of a 106-month term of imprisonment. The court's imposition of that sentence, in accordance with Rule 11(c)(1)(C), demonstrates that the specific sentence contained in the plea agreement provided the basis for petitioner's sentence.

b. In arguing to the contrary, petitioner attributes great significance to a provision in the plea agreement stating that "[petitioner] agrees to have his sentence determined pursuant to the Sentencing Guidelines." Pet. Br. 18 (quoting J.A. 28a). In petitioner's view, the "plain language" of that provision "alone" shows that his "sentence was intended to be and was in fact 'based on' the Guidelines." *Ibid.* But petitioner overstates the import of that provision, because he overlooks that the parties' agreement to a 106-month term of imprisonment did not obviate the need for the court to use the Guidelines to determine other aspects of petitioner's sentence. The parties did not reach a similarly specific agreement about such items as the fine or the term and conditions of supervised release. See J.A. 25a-26a.

Thus, even though the term of imprisonment was conclusively determined by the parties' agreement (and the court's acceptance of that agreement), there were still reasons, independent of the term of imprisonment, to calculate petitioner's offense level and criminal history score. For instance, the offense level was necessary to determine the amount of the fine (see Guidelines § 5E1.2(c)(3)), although the court ultimately waived the fine, pursuant to Guidelines § 5E1.2(a) and (e), due to petitioner's inability to pay. See J.A. 59a. In addition, even when the criminal-history calculations are not the basis for a defendant's sentence, such calculations are still relevant to the Bureau of Prisons, which uses them as part of its process for determining what level of supervision an inmate needs.[14]

The court of appeals was thus correct in concluding that the condition precedent to a Section 3582(c)(2) adjustment—that the term of imprisonment be "based on" the Guidelines range—was not satisfied in petitioner's case.

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[14] The Bureau of Prisons uses an inmate's criminal history, as reflected in the judgment or PSR, when making a "custody classification" for the inmate, which indicates "how much staff supervision an inmate requires." Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement P5100.08, Inmate Security Designation and Custody Classification*, Ch. 6, at 1 (Sept. 12, 2006), http://www.bop.gov/policy/progstat/5100_008.pdf; see also *id.* Ch. 6, at 4, 20 (providing for use of "Criminal History Score" in completing Custody Classification Form); *id.* Ch. 4, at 8-9 (explaining calculation of "Criminal History Score" from the judgment and statement of reasons, or the PSR).

C. Using Section 3582(c)(2) To Reduce A Specific Sentence That Was Required Under Rule 11(c)(1)(C) Inappropriately Vitiates The Terms Of The Parties' Agreement

Petitioner's construction of Section 3582(c)(2) would give defendants an unjustified windfall by allowing them to retain all the benefits of their plea agreements (*e.g.*, dismissal of counts and other sentencing concessions made by the government) while reducing their sentences and thus depriving the government of a principal benefit of their Rule 11(c)(1)(C) bargains (the guarantee of a particular sentence or sentencing range).

1. Plea agreements are essential to the administration of criminal justice

This Court recognized long ago that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971); see also Fed. R. Crim. P. 11 advisory committee's note (1974 Amendment) (noting that "[a]dministratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions," and characterizing "plea bargaining as an ineradicable fact"); Guidelines, Ch. 1, Pt. A, Subpt. 1, intro. comment. (n.4(c)) ("Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement.").[15]

[15] Of the 95,206 federal defendants whose cases resulted in judgment during Fiscal Year 2009, 87.9% were convicted upon guilty pleas. See Administrative Office of the U.S. Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts,* Tbl. D-4, at 239 (2010), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf.

Plea bargaining "flows from the 'mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (quoting *Brady* v. *United States*, 397 U.S. 742, 752 (1970)). For example, "a great many" defendants are "motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after trial to judge or jury," while the government may obtain a "more promptly imposed punishment" and preserve prosecutorial resources by not proceeding to trial. *Brady*, 397 U.S. at 752.

Consistent with the contractual nature of plea agreements, the parties to such agreements are generally held to the bargains struck through their negotiations. See, *e.g.*, *United States* v. *Hyde*, 520 U.S. 670, 671 (1997) (holding that a defendant was not entitled to withdraw a guilty plea before the agreement was accepted by court, absent a "fair and just reason," under language now located at Fed. R. Crim. P. 11(d)(2)(B)); *Santobello*, 404 U.S. at 262 (holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be part of the inducement or consideration, such promises must be fulfilled"); *Brady*, 397 U.S. at 757 ("A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action."); see also, *e.g.*, *United States* v. *Young*, 223 F.3d 905, 911 (8th Cir. 2000) (concluding that the government was "entitled to the benefit of its bargain" under a plea agreement), cert. denied, 531 U.S. 1168 (2001); *United States* v. *Ringling*, 988 F.2d 504, 506 (4th Cir. 1993) ("Plea bargains rest on

contractual principles, and each party should receive the benefit of its bargain."). Thus, a plea agreement remains binding even after a favorable change in the law that would have benefitted the defendant, because the "possibility" of such a change "occurring after a plea is one of the normal risks that accompanies a guilty plea." *United States* v. *Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005); accord *United States* v. *Robinson*, 587 F.3d 1122, 1129 (D.C. Cir. 2009); *United States* v. *Silva*, 413 F.3d 1283, 1284 (10th Cir. 2005).

2. The government's construction of Section 3582(c)(2) preserves the parties' bargain

In addition to being inconsistent with the binding nature of a type C agreement, permitting a defendant who pleaded guilty in exchange for a specific sentence to obtain a Section 3582(c)(2) sentence reduction would result in unjustified benefits to the defendant, at the government's expense.

In exchange for the certainty of obtaining a guilty plea and a specific sentence, the government often gives up the ability to seek a higher sentence, or moves to dismiss some of the charges against a defendant.[16] Indeed,

[16] See, *e.g.*, *United States* v. *Green*, 595 F.3d 432, 433-434 (2d Cir. 2010) (defendant pleaded guilty to Section 924(c) count and, on one of two drug counts, to lesser charge not carrying ten-year minimum, in exchange for the government's dismissal of second drug count and agreement on 168-month sentence); *Scurlark*, 560 F.3d at 842 (government agreed to dismiss two counts, forgo sentencing enhancements, and recommend 40% variance from agreed-upon sentencing range in exchange for guilty plea to single count); *Cieslowski*, 410 F.3d at 357 (government agreed to dismiss nine counts in exchange for 210-month sentence on single count to which defendant pleaded guilty); *United States* v. *Trujeque*, 100 F.3d 869, 870 (10th Cir. 1996) (government agreed to dismiss three drug counts and one firearm count in exchange for 84-month

in addressing the circumstances of the case that was consolidated with petitioner's in the court of appeals, that court recognized that the parties had "entered into a carefully constructed agreement in which the parties balanced many factors—including the charges to which [the defendant] would plead guilty, the charges which the Government would move to dismiss, and the amount of drugs for which [the defendant] would be held responsible." J.A. 74a. The parties' contractual bargain, which is binding on the court after it accepts a Rule 11(c)(1)(C) agreement, would be negated if Section 3582(c) were construed to grant the court discretion to lower the agreed-upon sentence in light of a later amendment to a Guidelines range.

In seeking a sentence reduction under Section 3582(c)(2), a defendant is not attempting to withdraw his guilty plea. Instead, he seeks to retain all the benefits of his plea agreement *in addition to* a lower sentence than the one to which he and the government agreed. But, by entering a type C plea agreement, petitioner already bargained away the possibility of a lower sentence. In such circumstances, permitting the sentencing court to exercise discretion under Section 3582(c)(2) to reduce his sentence would result in an unjustified windfall to him.

3. Petitioner benefitted from his plea agreement

The facts of this case reveal the potential for such unwarranted gains. Petitioner plainly benefitted from his plea agreement because he obtained the certainty of a 106-month sentence, which reflected a sentence at the bottom of his anticipated Guidelines range. In light of

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sentence on two less serious drug counts to which defendant pleaded guilty).

his extensive criminal history, which included convictions for, *inter alia*, second-degree attempted burglary, first-degree trafficking in a controlled substance, receiving stolen property and first-degree wanton endangerment, see J.A. 113a-128a, the district court, in the absence of the plea agreement, could well have imposed a higher sentence within the Guidelines range, an upward variance from petitioner's advisory range, or an upward departure on the ground that petitioner's criminal history category substantially under-represented the seriousness of his criminal history (Guidelines § 4A1.3(a)(1), p.s.). See p. 11, *supra* (describing how petitioner's criminal-history score was capped).

Petitioner was evidently concerned that his criminal history might result in a sentence greater than 106 months. Even though the plea agreement bound the court to a fixed sentence, it reserved the parties' right to challenge the district court's criminal-history calculation, and the parties struck from the agreement a provision that would have prevented petitioner from seeking a departure from his criminal-history category pursuant to Guidelines § 4A1.3. See J.A. 28a. As the prosecutor explained at the plea hearing, the significance of the deletion was "that if there's an issue that arises with regard to [petitioner's] criminal history, [petitioner's] attorney will have an opportunity to argue to the Court that his criminal history ought to be [IV]." J.A. 43a. By entering into a Rule 11(c)(1)(C) plea agreement to a specific sentence, however, petitioner eliminated the possibility that the government might seek, or that the district court might impose, a term of imprisonment greater than 106 months.

Petitioner could have agreed to have the district court sentence him under its own view of the applicable

Guidelines imprisonment range and of what an appropriate sentence within that range would be. See Fed. R. Crim. P. 11(c)(1)(B). Such a sentence would indeed have been "based on" a Guidelines range. But petitioner instead agreed to circumscribe the district court's discretion and to bind the government and the court to a 106-month term of imprisonment. Section 3582(c)(2) should be interpreted in a manner that holds petitioner to the terms of the bargain he struck.

4. Recognizing the binding nature of a Rule 11(c)(1)(C) agreement to a specific sentence is not inconsistent with waiver principles and does not render a sentence "immutable"

a. Contrary to petitioner's argument (Br. 25-26 & n.6), recognizing the binding nature of the parties' sentence stipulation in a type C plea agreement does not mean that Section 3582(c)(2) is trumped by either the agreement or Rule 11(c)(1)(C). Rather, the binding nature of the sentence in a Rule 11(c)(1)(C) agreement gives content to the statutory inquiry into whether such a sentence was "based on" a retroactively lowered Guidelines range.

Petitioner's extended discussion of waiver principles (Br. 34-38) is therefore beside the point. Petitioner contends (Br. 35) that "[i]n 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." He also contends that the integration clause of his plea agreement (J.A. 32a) "explicitly precludes a waiver of § 3582(c)(2) relief from being read into or implied from it," Pet. Br. 36-37, and that "[i]f the government wished [him] 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," *id.* at 37. Those arguments are misplaced. By its nature, a Rule 11(c)(1)(C) agreement in which the defendant pleads guilty in exchange for a specific sentence precludes a future reduction under Section 3582(c)(2). Because such a sentence is not "based on" the subsequently lowered Guidelines ranges, no right of eligibility for relief under Section 3582(c)(2) attaches in the first place; there simply is no right to "waive." Therefore, it was not necessary for the government to bargain for such a provision in the plea agreement in this case.

b. Similarly erroneous is petitioner's contention (Br. 39-42) that recognizing the binding nature of the agreement here would render a Rule 11(c)(1)(C) defendant ineligible for other forms of sentence reductions pursuant to Federal Rule of Criminal Procedure 35(b) or Section 3582(c)(1)(A). Unlike Section 3582(c)(2), those provisions do not condition eligibility for relief on a requirement that the sentence be "based on" a Guidelines range that was—in the words of the binding policy statement in Guidelines § 1B1.10(b)(1)—"applied when the defendant was sentenced." Nor is relief under Rule 35(b) or Section 3582(c)(1)(A) inconsistent with the contractual bargain struck by the parties to a Rule 11(c)(1)(C) agreement. In both of those scenarios, a sentence reduction must be instigated by the government (*i.e.*, the party that stands to cede some of the benefits of its bargain). See note 6, *supra*.

Moreover, the grounds for reductions under Rule 35(b) and Section 3582(c)(1)(A) are exceptional developments with respect to the defendant himself that occurred after the original plea (*e.g.*, the defendant's rendering of substantial assistance to law enforcement or

his reaching 70 years of age after having served 30 years of imprisonment). By contrast, none of the factors particular to petitioner had changed when he sought relief under Section 3582(c)(2); the only change was a relatively small decrease in the Guidelines range (from 106-117 months to 97-106 months). But a defendant who enters into a type C agreement assumes the risk of a future, ameliorative change in the penalties applicable to his offense by binding the district court to a specific sentence in exchange for his guilty plea.

c. Finally, contrary to petitioner's contention (Br. 39), the government's construction of Section 3582(c)(2) is not inconsistent with the Sentencing Commission's determination, when it retroactively lowers a Guidelines range, "that the original guideline was too harsh." The sentencing benefits that a Rule 11(c)(1)(C) defendant receives pursuant to his or her plea agreement will often approximate, and could well exceed, any sentence reduction a defendant may receive within the "narrow bounds established by the Commission" pursuant to Section 3582(c)(2). *Dillon*, 130 S. Ct. at 2694.

For example, even if petitioner were found to be eligible for Section 3582(c)(2) relief, he could have received a reduction of no more than nine months of his 106-month term of imprisonment. J.A. 75a. But, as discussed above, by pleading guilty at the outset in exchange for the 106-month term, petitioner avoided the possibility that his extensive criminal history would lead the government to request, and the district court to impose, a sentence at or above the top of the earlier Guidelines range (117 months). While the record does not disclose what sentence the district court would have imposed if it had not been bound by the stipulated 106-month sentence, petitioner potentially took at least 11

months off of his original sentence by pleading guilty under a Rule 11(c)(1)(C) agreement prescribing a specific sentence.

Furthermore, in many cases, a Rule 11(c)(1)(C) defendant will have had some charges dismissed as part of his plea agreement, perhaps including even a count carrying a mandatory minimum sentence. See note 16, *supra* (citing illustrative cases). The benefits that such a defendant received as part of his original bargain could easily exceed any sentence reduction that he could have later received under Section 3582(c)(2) had he not entered into a binding agreement about a specific sentence. Therefore, construing Section 3582(c)(2) to preclude sentence reductions for a defendant who pleaded guilty in exchange for a specific sentence or sentencing range appropriately preserves the terms of the parties' bargain and works no injustice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3582 provides in pertinent part:

Imposition of a sentence of imprisonment

* * * * *

(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. 18 U.S.C. 3742 provides in pertinent part:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprison-

ment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

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[1] See References in Text note below.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

* * * * *

3. Federal Rule of Criminal Procedure 11 provides in pertinent part:

Pleas

* * * * *

(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.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(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.

* * * * *

4. Sentencing Guidelines § 1B1.10 provides:

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitations and Prohibition on Extent of Reduction.—

(A) In General.—Except as provided in subdivision (B), the court shall not re-

duce 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.

(B) Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(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.

Commentary

Application Notes:

1. *Application of Subsection (a).—*

   (A) *Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) None of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).*

   (B) *Factors for Consideration.—*

      (i) *In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).*

      (ii) *Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the commu-*

nity that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) Whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) <u>Post-Sentencing Conduct</u>.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) Whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. <u>Application of Subsection (b)(1)</u>.—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. <u>Application of Subsection (b)(2)</u>.—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's

term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) The guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) The guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised

> *release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).*

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n 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."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines[*] *or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

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[*] So in original. Probably should be "to fall above the amended guidelines".

5. Sentencing Guidelines § 6B1.2 provides in pertinent part:

Standards for Acceptance of Plea Agreements (Policy Statement)

* * * * *

(c) 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.