"Based On" the Guidelines? Applying Retroactive Sentencing Amendments to Binding Plea Agreements

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INTRODUCTION

In recent years, two pronounced trends have dominated criminal law jurisprudence and captivated criminal law scholarship: the re-emergence of discretionary sentencing and measures to reduce the crack–powder cocaine sentencing disparity. The first time they converged, in *Kimbrough v United States*,[1] the Supreme Court ruled in favor of discretion and reduction. With the passage of several amendments to the United States Sentencing Guidelines in 2007 aimed at mitigating the crack-powder sentencing disparity, the two trends have converged once again—with surprisingly different results.

These Guidelines amendments reduce the base offense level for most crack offenses by two levels and permit defendants who received sentences under the old Guidelines to apply for sentence reductions. District courts generally have broad discretion to grant or deny these motions, but controversy has arisen over whether courts may grant sentence reductions for offenders whose sentences were imposed pursuant to binding plea agreements.

The majority of courts hold that judges cannot grant such reductions. They reason that 18 USC § 3582(c)(2) prohibits courts from granting a sentence-reduction motion unless a defendant's original sentence was "based on" the subsequently amended Guidelines, and a sentence that is fixed via plea agreement is based exclusively on that agreement. In other words, sentencing judges' hands are tied because the underlying sentences are "based on" plea bargains, not the Guidelines. Meanwhile, a growing minority of courts has been willing to grant reductions under certain circumstances to defendants who accepted binding plea agreements. This Comment disputes the majority position, arguing that a per se rule precluding district courts from reducing sentences imposed pursuant to binding plea agreements is inconsistent with both proper interpretation of the applicable federal

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1 552 US 85 (2007).

statute and the quasi-contractual, "contracts plus" framework courts utilize to construe plea agreements.

While the flood of litigation surrounding the retroactive crack amendments spurred this analysis, failure to reach the correct outcome on this issue will directly—and adversely—affect a much broader universe of cases: the principles attending the current circuit split and the solutions that the courts reach will apply to *all* subsequent amendments to the Guidelines. By erecting a bright-line rule preventing all defendants whose sentences were fixed by plea agreement from availing themselves of the amended Guidelines, the courts will preclude a substantial percentage of persons convicted of offenses later deemed by the United States Sentencing Commission (USSC)—and at least implicitly by Congress—to carry excessive penalties from benefiting from retroactive Guidelines amendments.

This Comment proceeds in four Parts. Part I outlines the current role of the Sentencing Guidelines, the basics of plea agreements in the federal system, and the recent Guidelines amendments. Part II sets forth the case law on the application of retroactive Guidelines amendments to sentences imposed via binding plea agreement, noting that opposition to reducing sentences is no longer uniform. Part III delves into the applicable statutes and Guidelines, determining that proper statutory interpretation counsels against the bright-line rule adopted by the majority of courts. And Part IV distills from the case law what this Comment terms the "contracts plus" framework for construing plea agreements and applies it to suggest that contract principles support the conclusion that defendants party to binding plea agreements should be permitted to seek sentence reductions in light of subsequent retroactive Guidelines amendments.

I. THE SENTENCING LANDSCAPE

Before considering the courts' application of retroactive Guidelines amendments to binding plea agreements, it is first necessary to sketch the general contours of the three doctrinal components that converge in the cases. Part I.A traces the evolution of the Sentencing Guidelines from their inception as a mandatory scheme to their current, advisory status. Part I.B briefly outlines the role of plea bargains in the federal criminal law. Finally, Part I.C surveys the amendments to the Guidelines promulgated by the USSC in 2007.

A. The Sentencing Guidelines

1. The Sentencing Reform Act.

The Sentencing Reform Act of 1984[2] (SRA) established the USSC[3] and charged it with promulgating guidelines—ultimately published as the United States Sentencing Guidelines—for determining sentences in federal criminal cases.[4] The Act further instructed the USSC to issue policy statements "regarding application of the guidelines or any other aspect of sentencing . . . that . . . would further the purposes set forth in [18 USC §] 3553(a)(2)."[5] Section 3553(a)(2) enumerated the classic objectives of criminal sanctions, including retribution, deterrence, incapacitation, rehabilitation, and reinforcement of the rule of law.[6] The SRA mandated consideration of these factors in light of an overarching "parsimony principle," which requires that sentences be "sufficient, but not greater than necessary" to achieve the purposes outlined in § 3553(a)(2).[7]

Congress intended the Guidelines to be a living organism, as evidenced by several provisions in the SRA that deal with modification of the Guidelines.[8] Most important for the purposes of this Comment, the SRA anticipated the effect of retroactive amendments to the Guidelines. Although under most circumstances sentences constitute final judgments and cannot be modified, § 3582(c)(2) (which the SRA created) stipulated that

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . 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.[9]

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2 Sentencing Reform Act of 1984 (SRA), Pub L No 98-473, ch 2, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

3 SRA § 217, 98 Stat at 2018, codified at 28 USC § 991.

4 SRA § 217, 98 Stat at 2019, codified at 28 USC § 994(a)(1).

5 SRA § 217, 98 Stat at 2019, codified at 28 USC § 994(a)(2).

6 SRA § 212, 98 Stat at 1989, codified at 18 USC § 3553(a)(2).

7 SRA § 212, 98 Stat at 1989, codified at 18 USC § 3553(a).

8 See, for example, SRA § 217, 98 Stat at 2023, codified at 28 USC § 994(o)–(p), (r) (charging the USSC with the duty to "periodically . . . review and revise" the Guidelines and requiring the USSC to "recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate").

9 SRA § 212, 98 Stat at 1999, codified at 18 USC § 3582(c)(2).

Accordingly, when the USSC amends the Guidelines and applies the amendment retroactively, a defendant may attempt to take advantage of the new Guidelines range so long as (1) the original sentence was "based on" the amended range, and (2) a reduction would be consistent with USSC policy statements. Congress elaborated upon the second criterion two years later, when it amended the SRA to require that when the USSC reduces the sentencing range associated with an offense, the Commission "shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."[10]

Of course, the Guidelines have undergone a dramatic transformation over the past decade. While the shift from a mandatory regime intended to curb judicial sentencing discretion[11] to an advisory system increasingly permissive of discretion has been well documented and analyzed elsewhere[12] and is beyond the scope of this Comment, a proper understanding of the retroactive application of Guidelines amendments to binding plea agreements requires contextualization within the current sentencing landscape. A brief review of recent Supreme Court sentencing jurisprudence is in order.

2. A return to discretion.

The Supreme Court's decision in *United States v Booker*[13] upended two decades of sentencing practice, pronouncing the mandatory Guidelines regime unconstitutional.[14] In doing so, the Court excised the portion of the SRA that formally bound district courts to impose sentences within Guidelines ranges.[15] Henceforth, the Court proclaimed, the Guidelines would be "effectively advisory."[16]

In 2007, the Court returned to the sentencing arena in *Gall v United States*[17] to elaborate upon the role of the Guidelines post-*Booker*. Holding that sentencing judges need not find "extraordinary" circumstances to depart from Guidelines ranges, the Court refused to

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10 Criminal Law and Procedure Technical Amendments Act of 1986 § 6(b)(3), Pub L No 99-646, 100 Stat 3592, 3593, codified as amended at 18 USC § 994(u).

11 See Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 45 (Chicago 1998); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L Rev 1, 4 (1988).

12 See, for example, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L J 1420, 1484–94 (2008); Lynn Adelman and Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 Berkeley J Crim L 239, 248 (2008).

13 543 US 220 (2005).

14 Id at 245.

15 Id.

16 Id.

17 552 US 38 (2007).

sanction a "presumption of unreasonableness" on appeal for sentences that deviate from the Guidelines.[18] In addition to bolstering sentencing discretion, the Court clarified precisely how district courts are to apply the advisory Guidelines. Notably, the Court instructed district courts to "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," thereby ensuring that the Guidelines function as "the starting point and the initial benchmark" for all sentencing determinations.[19] *Gall* thus elucidated the contours of an "advisory" Guidelines regime: although sentencing judges now have significant discretion to deviate from the Guidelines, "failing to calculate (or improperly calculating) the Guidelines range" constitutes reversible error.[20] In so doing, the Court ensured that all sentencing proceedings unfold in the shadow of the Guidelines.

Finally, in *Kimbrough*, the Court upheld district court discretion to impose below-Guidelines sentences on account of policy disagreements with the crack-powder disparity.[21] In other words, the cocaine Guidelines—as pertain to both crack and powder cocaine—are just as advisory under *Booker* as the rest of the Guidelines,[22] and sentencing judges may not treat the 100-to-1 crack-powder sentencing disparity embodied in the Guidelines as "effectively mandatory."[23]

B. Plea Agreements under the Federal Rules of Criminal Procedure

A clear understanding of the Guidelines alone is not sufficient to analyze the sentences at issue in this Comment. Further complicating these sentences is the fact that they were imposed pursuant to binding plea agreements.

1. Types of plea agreements.

The Federal Rules of Criminal Procedure permit the parties to a criminal proceeding to "discuss and reach a plea agreement."[24] These agreements can take one of two forms—nonbinding or binding.[25]

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18 Id at 47.

19 Id at 49.

20 Id at 51.

21 552 US at 106–08. For background on the crack-powder disparity, see generally William Spade, Jr, *Beyond the 100:1 Ratio: Toward a Rational Cocaine Sentencing Policy*, 38 Ariz L Rev 1233 (1996).

22 But see *Dillon v United States*, 130 S Ct 2683, 2683 (2010) (holding that USSG § 1B1.10(b) is binding on district courts).

23 *Kimbrough*, 552 US at 91.

24 FRCrP 11(c)(1). Prior to 2002, these provisions were located in Rule 11(e). The 2002 amendments did not alter the wording of the Rule.

25 Technically, under FRCrP 11, plea agreements can take three forms: binding, FRCrP 11(c)(1)(C), nonbinding, FRCrP 11(c)(1)(B), or specifying that the government will "not bring,

Nonbinding plea agreements are essentially joint recommendations: the government directly recommends, or agrees not to oppose, a particular sentence, a sentencing range, or the (in)applicability of a particular sentencing factor.[26] In these cases, there is no ambiguity regarding the grounds upon which the ensuing sentences are based. Like a sentencing in the aftermath of a jury verdict, the judge controls all aspects of the sentencing proceeding. She has to calculate the applicable Guidelines range in accordance with *Gall*, after which she has discretion to deviate from the Guidelines as she sees fit. Because the judge must always "adequately explain" deviations from the Guidelines,[27] there should be a record of the judge's basis for imposing a sentence. The issue whether the sentence was "based on" the Guidelines will not be in question for nonbinding plea agreements, so they need not be addressed in this Comment.

In contrast, a Rule 11(c)(1)(C) plea "binds the court once the court accepts the plea agreement."[28] The court remains free to reject or defer judgment on the agreement,[29] but if the judge accepts it she cannot impose a sentence inconsistent with the terms memorialized in the agreement. Whether the agreement binds the court to a specific term of imprisonment,[30] sentencing range,[31] or maximum sentence[32] depends entirely on the bargain struck by the parties.

Plea agreements can vary widely, so to ease its analysis, this Comment introduces a typology that divides the universe of agreements into three general categories, defined by reference to the defendant's applicable Guidelines range. Category I plea agreements impose sentences within the applicable range. Category II plea agreements stipulate quantifiable downward departures from the Guidelines range—for example, a 20 percent departure from the low end of the range. Finally, Category III agreements call for sentences below the Guidelines range, indeterminately related to the defendant's

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or will move to dismiss, other charges." FRCrP 11(c)(1)(A). For the purposes of this Comment, however, Rule 11(c)(1)(A) agreements can be treated as a subset of nonbinding plea agreements because they do not curb a judge's sentencing discretion. See USSG § 6B1.2(a) ("[A] plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered . . . in connection with the count(s) of which the defendant is convicted.").

26 FRCrP 11(c)(1)(B).

27 *Gall*, 552 US at 50.

28 FRCrP 11(c)(1)(C).

29 See FRCrP 11(c)(3)(A).

30 See, for example, *United States v Trujeque*, 100 F3d 869, 870 (10th Cir 1996).

31 See, for example, *United States v Scurlark*, 560 F3d 839, 840 (8th Cir 2009), cert denied, 130 S Ct 738 (2009).

32 See, for example, *United States v Main*, 579 F3d 200, 202 (2d Cir 2009).

applicable range.[33] As Part III demonstrates, an agreement's categorization is tremendously important: it will, in large part, control whether a defendant's sentence is eligible for reduction, because Category I and (generally speaking) Category II plea agreements are "based on" the Guidelines and consistent with the applicable USSC policy statement, while Category III agreements likely are not.

At first blush, the boundary between Categories II and III might seem arbitrary. For instance, imagine a defendant with an applicable Guidelines range of 70 to 87 months. The parties settle upon a sentence of 56 months and memorialize it in a binding plea agreement, which the judge accepts without explanation.[34] The agreement makes no reference to the defendant's Guidelines range. Under these facts, the agreement belongs in Category III. One might argue, however, that the defendant's sentence in fact represents a 20 percent departure from the low end of the applicable range, so the agreement actually falls under Category II. This argument is misguided.

That the sentence can be recast ex post as a Category II is irrelevant. Nor is there talismanic power in the words "20 percent departure," magically transforming a Category III into a Category II agreement. To be sure, as a factual matter a plea agreement calling for a 56 month sentence and a plea agreement calling for a 20 percent departure from the bottom of the applicable range achieve the same result. But the distinction between Categories II and III lies not in the agreement's ultimate consequence, but in whether it contains evidence that the sentence was fixed by reference to the Guidelines.[35] The fundamental question is whether, working backward from a fully executed binding plea agreement, there is sufficient indication that the sentence was "based on" the Guidelines. Absent some objective manifestation tying the agreement to the applicable Guidelines range,

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33 Such sentences are ostensibly the result of provisions that are not considered when calculating a defendant's applicable Guidelines range, namely § 3553(a), see *United States v Bride*, 581 F3d 888, 889 (9th Cir 2009), cert denied, 130 S Ct 1160 (2010), or USSG § 5K1.1 ("Substantial Assistance to Authorities").

34 In theory, this should not be possible. Judges who accept binding plea agreements inconsistent with the applicable Guidelines range are supposed to explain their decisions to depart. See Part I.B.2. In practice, however, judges do not always explain their decisions. See, for example, *Main*, 579 F3d at 202. This disconnect can best be explained in legal realist terms: The terms of the bargain are adequate to the government, as evidenced by its willingness to accept it. Meanwhile, even if the defendant later regrets his decision to accept it, he has almost certainly waived his right to appeal the length of the prison term. Thus, from the perspective of the sentencing judge, neither party is going to appeal the decision, so it does not matter if the judge's explanation (or lack thereof) for accepting the agreement does not conform to the procedures outlined in USSG § 6B1.2. See Nancy J. King, *Regulating Settlement: What Is Left of the Rule of Law in the Criminal Process?*, 56 DePaul L Rev 389, 396 (2007) ("[J]udges are under more pressure to facilitate deals than to scrutinize them.").

35 See *United States v Franklin*, 600 F3d 893, 896–97 (7th Cir 2010).

a judge has no justification for concluding that the sentence was "based on" the Guidelines.[36] She therefore cannot grant a sentence-reduction motion. Thus, the distinction between Categories II and III is not formalistic, but rather evidentiary.

2. Binding plea agreements and sentencing.

By accepting a binding plea agreement, a judge does not forgo sentencing proceedings. Indeed, acceptance results only in the court entering a judgment of conviction;[37] the judge still must take the additional step of imposing a sentence. When the agreement binds the court to a sentencing range, the judge must settle upon a prison term within that range. When the agreement stipulates a precise sentence, the judge is necessarily bound to impose that sentence, but as a formal matter the court still must "state in open court the reasons for its imposition of the particular sentence"[38] and file an order of commitment.[39]

The Guidelines apply to all sentences, including those mandated by binding plea agreements. Consequently, the court is permitted to accept a binding plea only if (1) it is within the applicable Guidelines range, or (2) the judge is satisfied that the sentence departs for "justifiable reasons," and "those reasons are specifically set forth in writing."[40] The Guidelines specify that a reason is "justifiable" if it is authorized by 18 USC § 3553(b).[41] Of course, *Booker* excised § 3553(b).[42] Curiously, the USSC has not amended the policy statement governing acceptance of plea agreements post-*Booker*, so it is unclear what currently constitutes a "justifiable" reason for departure. The most logical maneuver—and the one courts seem to be employing—would be to incorporate the standard that *Booker* substituted for § 3553(b), in which case departures would be justifiable if they are supported by the § 3553(a) factors.[43]

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36 Id at 896 (explaining that the plea agreement in *Ray*, which called for a 263 month term of imprisonment but neither referred to the Guidelines nor indicated how the parties arrived at the 263 month figure, was not "based on" the Guidelines), citing *United States v Ray*, 598 F3d 407, 409–10 (7th Cir 2010).

37 See FRCrP 32(k)(1); USSG § 1B1.2(c) (stating that plea agreements specifically stipulating the commission of an offense shall be treated as if the defendant had been convicted of the offense).

38 18 USC § 3553(c).

39 See 18 USC § 3621(c).

40 USSG § 6B1.2. See also 18 USC § 3553(c).

41 USSG § 6B1.2, Application Note 2.

42 See note 15 and accompanying text.

43 See, for example, *United States v Vigil*, 2005 WL 3662908, *5–6 (D NM).

3. Modifying plea agreements.

As part of their plea bargains, defendants often waive their right to appeal or collaterally attack their sentences or underlying convictions on any ground, save ineffective assistance of counsel.[44] Subject to a limited (and narrowly defined) category of exceptions, once the court accepts a plea agreement the sentence cannot be modified.[45] Nevertheless, courts are often called upon to interpret provisions of plea agreements.[46] In such instances, it is well settled that courts construe plea agreements according to the principles of contract law.[47] Although plea agreements are contractual in nature, the stakes—namely, the waiver of multiple constitutional rights—might in some cases render contract analysis inappropriate.[48] One way courts have addressed this concern is by importing the doctrine of *contra proferentem* (by which an ambiguous term is construed against the party who imposed it).[49] The net result is that "[p]lea agreements are interpreted using contract principles with any ambiguity construed in the defendant's favor,"[50] a framework that this Comment terms "contracts plus."

C. Recent Amendments: Crack Cocaine and Sentence Reductions

Recent amendments to the Guidelines have highlighted the uncertainty about whether defendants who accepted binding plea agreements can avail themselves of retroactive Guidelines amendments. Although the USSC initially adopted the infamous 100-to-1 crack-powder ratio established by Congress in the Anti–Drug Abuse Act of 1986[51] to define base offense levels for all cocaine offenses, the

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44 Some agreements also reserve prosecutorial misconduct, see *United States v Lee*, 502 F3d 447, 451 (6th Cir 2007) (Batchelder dissenting), or the right to appeal sentences above a statutory maximum or the applicable Guidelines range, see *United States v Montano*, 472 F3d 1202, 1203 (10th Cir 2007).

45 See *United States v Aqua-Leisure Industries*, 150 F3d 95, 96 n 1 (1st Cir 1998) (listing as the exceptions substantial assistance to authorities, government motion for fine reduction, and reduction in prison term because of a retroactive Guidelines amendment or on a motion from the Bureau of Prisons).

46 See, for example, *United States v Cvijanovich*, 556 F3d 857, 862 (8th Cir 2009).

47 See *Puckett v United States*, 129 S Ct 1423, 1430 (2009).

48 *United States v Peveler*, 359 F3d 369, 375 (6th Cir 2004) ("[T]he analogy of a plea agreement to a traditional contract is not complete or precise, and the application of ordinary contract law principles to a plea agreement is not always appropriate.").

49 See Shayna M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U Chi L Rev, 1317, 1321 (1999).

50 *United States v Watson*, 582 F3d 974, 986 (9th Cir 2009). See also *United States v Ingram*, 979 F2d 1179, 1184 (7th Cir 1992) (describing plea agreements as "unique contracts" in which "ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause").

51 Anti–Drug Abuse Act of 1986 § 1002, Pub L No 99-570, 100 Stat 3207, 3207-3. See also *Kimbrough*, 552 US at 95–96.

Commission has since revised its stance on the disparity between crack and powder sentences.

1. Amending the crack Guidelines.

As early as 1995, the USSC proposed amendments that would have replaced the 100-to-1 ratio with a 1-to-1 ratio.[52] Congress rejected the amendments.[53] Undeterred, the USSC issued reports in both 1997 and 2002 urging Congress to reduce the crack-powder disparity; once again, Congress declined to act upon the Commission's recommendations.[54] The Commission issued yet another report in 2007,[55] but this time, rather than waiting for Congress to act, the USSC took matters into its own hands and issued Amendment 706. This measure reduced the base offense level for most crack cocaine offenses by two levels.[56] The USSC stressed that it aimed to reduce the 100-to-1 crack-powder disparity, which in its judgment "significantly undermine[d] various congressional objectives set forth in the Sentencing Reform Act."[57] It is evident from the language of the Amendment that the Commission was frustrated by a decade of congressional inaction with respect to what it considered one of the more problematic aspects of the Guidelines.[58] While conceding that "federal cocaine sentencing policy ultimately is the Congress's prerogative," the Commission invoked its limited authority to craft an "interim measure" because "the problems associated with the 100-to-1 drug quantity ratio [were] so urgent and compelling."[59] Notably, Congress had the power to exercise its veto power over the amendment[60] but did not exercise that authority.[61] Six months later, the USSC adopted Amendment 713, applying Amendment 706 retroactively.[62]

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52 See *Kimbrough*, 552 US at 99 (noting the Commission's various attempts to achieve a reduction in the crack-powder ratio).

53 See Act of Oct 30, 1995 § 1, Pub L No 104-38, 109 Stat 334, 334.

54 See *Kimbrough*, 552 US at 99 (noting that the 1997 report sought to reduce the ratio to 5-to-1 while the 2002 report recommended a ratio of no more than 20-to-1).

55 USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007), online at http://www.ussc.gov/r_congress/cocaine2007.pdf (visited Apr 10, 2010).

56 See USSG Appendix C, Amend 706 (Supp 2009).

57 USSG Appendix C, Amend 706.

58 USSG Appendix C, Amend 706.

59 USSG Appendix C, Amend 706.

60 See 28 USC § 994(p).

61 Congress finally abandoned the 100-to-1 crack-powder ratio in August 2010, when it enacted legislation that reduced the drug-quantity ratio to 18-to-1. See Fair Sentencing Act of 2010 § 2, Pub L No 111-220, 124 Stat 2372, 2372.

62 USSG Appendix C, Amend 713.

2. Amending the sentence-reduction policy statement.

Simultaneously with Amendment 713, the USSC issued Amendment 712, which revised the Guidelines' sentence-reduction policy statement.[63] The Commission first reaffirmed that a sentence reduction would not be consistent with the policy statement unless it had "the effect of lowering the defendant's applicable guideline range."[64] The policy statement then clarified how courts should carry out sentence reductions: to calculate the new range, courts must simply substitute the amended provision (for example, a new base offense level) for the corresponding pre-amendment provision, leaving all other Guidelines application decisions unaffected.[65] It added that courts generally should not reduce a defendant's sentence to a term of imprisonment below the floor of the amended Guidelines range,[66] unless the original sentence "was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing." In that case, "a reduction comparably less than the amended guideline range . . . may be appropriate."[67] Finally, if the original sentence was a "non-guideline sentence . . . a further reduction generally would not be appropriate."[68] Notably, the Commission distinguished between a sentence reflecting a downward departure from a Guidelines range and a "non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*."[69] The difference lies in the fact that the former sentence is determined by reference to the applicable Guidelines range (for example, a 20 percent reduction from the low end of the Guidelines range),[70] whereas the latter involves a sentence that bears no apparent relation to the Guidelines.[71] Or, in the parlance of this Comment, the former are Category II agreements, while the latter are Category III.[72]

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63 See USSG Appendix C, Amend 712 (amending USSG § 1B1.10).

64 USSG Appendix C, Amend 712.

65 USSG § 1B1.10, Application Note 2.

66 USSG § 1B1.10, Application Note 3.

67 USSG § 1B1.10(b)(2)(B). See also USSG § 1B1.10, Application Note 3; Part III.B.

68 USSG § 1B1.10(b)(2)(B).

69 USSG § 1B1.10(b)(2)(B).

70 See USSG § 1B1.10, Application Note 3.

71 See *Franklin*, 600 F3d at 897 (clarifying that if the defendant's agreement "had provided that the term of imprisonment was to be '40% below the low end of the guidelines range,' . . . then the government agrees that the plea would be 'based on' a guidelines range for section 3582(c)(2) purposes").

72 See Part I.B.1. This Comment recognizes that the initial sorting of plea agreements into Categories II and III is merely an assumption about how the parties reached their agreement, and is not dispositive of the § 3582(c)(2) issue. For example, review of the sentencing transcript might indicate that a Category II plea agreement specifying a 40 percent reduction from the low

More importantly for the purposes of this Comment, Amendment 712 directly addressed the question of who is eligible to benefit from the retroactive reductions to the crack Guidelines. The stated purpose of the Amendment was to "to clarify circumstances in which a reduction in the defendant's term of imprisonment is not consistent with the policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2)."[73] Under a section entitled "Eligibility," the Commission declared that a sentence reduction is not authorized either if no amendment is applicable to the defendant, or if an applicable 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)."[74] Accordingly, any defendant whose sentence is "based on" the amended provisions of the Guidelines and who is not excepted by either of these limitations remains eligible to move for a sentence reduction under § 3582(c)(2).[75]

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For crack offenders who accepted binding plea agreements prior to Amendment 706, the § 3582(c)(2) inquiry thus unfolds within the following framework: The judge was not permitted to accept a binding plea agreement unless it either fell within the applicable Guidelines range or departed for justifiable reasons specifically set forth in writing. Following the enactment of Amendment 713, the defendant could move for a two-level sentence reduction so long as the underlying sentence was "based on" the subsequently amended Guidelines range and the reduction would be consistent with the Commission's policy

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end of the applicable range explicitly justified the reduction by reference to § 3553(a). In that case, the Category II agreement would be ineligible for reduction.

The reference to the Guidelines in Category II agreements (or lack thereof in Category III agreements) functions merely as a proxy for whether a sentence was a Guidelines or non-Guidelines one. In the end, the § 3582(c)(2) determination involves consideration of the "nuances of both the plea agreement and the sentencing transcript in each particular case." *United States v Garcia*, 606 F3d 209, 214 (5th Cir 2010). This Comment argues simply that Category II agreements, in light of their explicit reference to the Guidelines and their treatment in USSG § 1B1.10, Application Note 3, should be presumptively "based on the Guidelines," while Category III agreements are presumptively non-Guidelines due to their lack of explicit reliance on the defendant's applicable Guidelines range. The burden should then shift to the opposing party to prove that the facts of the case rebut the applicable presumption. If no language in the agreement or sentencing transcript supports the contrary outcome, the presumption should control. See Part III.C.

73 USSG Appendix C, Amend 712.

74 USSG § 1B1.10, Application Note 1(A).

75 USSG § 1B1.10 ("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.").

statement. If the sentence was a "Guidelines" sentence, like all Category I and most Category II plea agreements, reduction would be consistent with the policy statement; if the sentence was, like in most Category III agreements, a "non-Guidelines" sentence imposed pursuant to § 3553(a) or a statutory mandatory minimum, reduction would generally not be appropriate. Having outlined the doctrinal foundation upon which retroactive sentencing amendments and binding plea agreements interact, Part II surveys how the courts have applied § 3582(c)(2) to binding plea agreements.

II. APPLYING RETROACTIVE AMENDMENTS

The operation of retroactive Guidelines amendments is typically straightforward: for a defendant who proceeded to trial, was convicted of an offense by a jury, and received a sentence in accordance with the Guidelines range for that offense, it is clear that the offender's sentence was "based on" a subsequently amended Guideline range. He can therefore move the court to reduce his sentence pursuant to § 3582(c)(2). While it remains firmly within the district judge's discretion to grant or deny the reduction, there is no doubt that such a prisoner has the right to bring, and the judge the authority to consider, a motion for reduction.[76]

But most federal prisoners are not convicted by a jury. In fact, approximately 95 percent of criminal cases in the federal system are disposed of by plea agreement.[77] The question, then, is when a sentence is imposed pursuant to a Rule 11(c)(1)(C) agreement, is it possible for the sentence to be "based on" a subsequently lowered Guidelines range? The courts rarely had the opportunity to address this question prior to the crack amendments. These responses are discussed in Part II.A. Since 2008, however, courts have encountered a flood of § 3582(c)(2) motions arising from Amendments 706 and 713. The resulting circuit split is analyzed in Part II.B.

A. Early Decisions

The USSC seldom implements amendments to the Guidelines retroactively.[78] As a result, the courts had few occasions to consider the applicability of § 3582(c)(2) to binding plea agreements prior to the

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76 See *United States v Trujeque*, 100 F3d 869, 870–71 (10th Cir 1996).

77 See USSC, *Sourcebook of Federal Sentencing Statistics* figure C (2009), online at http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm (visited Apr 10, 2010).

78 In the twenty-three years that the Guidelines have been in force, the USSC has enacted 747 amendments to the Guidelines, but has implemented only 27 (3.6 percent) retroactively. See USSG § 1B1.10(c).

onslaught of litigation following the crack amendments. Nevertheless, all of the appellate courts to consider the issue before 2008 reached the same conclusion: defendants who agreed to 11(c)(1)(C) pleas are not eligible for sentence reductions under § 3582(c)(2).

The Tenth Circuit in *United States v Trujeque*[79] was the first to deal directly with the issue. The defendant, Patrick Trujeque, accepted a Rule 11(e)(1)(C)[80] agreement stipulating a specific sentence of 84 months in prison, well below his applicable range of 121 to 151 months.[81] The government also agreed to drop the four drug and firearm counts in Trujeque's grand jury indictment and allow him to plead to a lesser charge.[82] The USSC subsequently enacted Amendment 488, which lowered the base offense level for the indicted offenses by four levels.[83] Under the amended Guidelines, Trujeque's applicable sentencing range would have been 78 to 99 months.[84] Trujeque filed a § 3582(c)(2) motion, seeking a reduction to his prison term in light of Amendment 488.[85] Citing the discrepancy between the defendant's applicable range and the 84 month sentence that Trujeque accepted, the Tenth Circuit concluded that the defendant's sentence was based not on a subsequently lowered sentencing range, but on "a valid Rule 11(e)(1)(C) plea agreement."[86] The court held that "because Mr. Trujeque entered a plea agreement . . . pursuant to 11(e)(1)(C), he may not seek a reduction in his sentence via 18 U.S.C. § 3582(c)(2)."[87]

Over the next few years, the Seventh and Ninth Circuits followed suit in unpublished opinions. The Seventh Circuit acted first, holding in *United States v Hemminger*[88] that "a sentence imposed following a plea under Rule 11(e)(1)(C) cannot be altered even if the Sentencing Commission designates certain changes to the Guidelines as retroactive."[89] The court reasoned that the defendant's sentence rested entirely "on the parties' agreement, not on a calculation under the Sentencing Guidelines."[90] Justifying its conclusion by reference to contract principles, the court asserted that once a defendant receives the benefits of a plea agreement, he "must accept the portions favorable to the

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79 100 F3d 869 (10th Cir 1996).

80 For the purposes of this discussion, 11(e)(1)(C) and 11(c)(1)(C) will be used interchangeably. See note 24.

81 *Trujeque*, 100 F3d at 870.

82 Id.

83 Id at 870 n 2.

84 Id.

85 *Trujeque*, 100 F3d at 870.

86 Id at 871.

87 Id at 869.

88 1997 WL 235838 (7th Cir).

89 Id at *1.

90 Id.

prosecutor."[91] The defendant in this case could not "keep the benefits of the plea while receiving a lower sentence," for he "bargained away" any possibility of a lower sentence when he accepted his plea agreement.[92] The court did not address the heightened due process considerations that inhere in plea agreements.[93]

Next came the Ninth Circuit's decision in *United States v McKenna*,[94] which likewise held that the defendant's sentence "was not predicated on a Sentencing Guidelines range that has been subsequently lowered, but rather on a valid Rule 11(e)(1)(C) plea agreement."[95] Notably, Peter McKenna's marijuana offenses subjected him to a ten-year statutory minimum, but the district court granted the government's motion to depart below the mandatory minimum[96] and allowed him to accept a plea agreement imposing a sentence of 84 months.

The Sixth Circuit provided the most thorough analysis of § 3582(c)(2)'s applicability to binding plea agreements. *United States v Peveler*[97] concerned Amendment 599, which barred the "double counting" of a two-level firearm enhancement when the defendant was also convicted of a separate firearm violation for the same underlying conduct.[98] The defendant's 11(e)(1)(C) plea agreement contained specific Guidelines calculations showing how the parties arrived at a total offense level of thirty and explicitly stated that "[b]oth parties have independently reviewed the Sentencing Guidelines applicable in this case."[99] The court noted that plea agreements are traditionally regarded as contracts, and as such can be modified under certain circumstances—namely upon a showing of mutual mistake.[100] It concluded, however, that once a court accepts a Rule 11(c)(1)(C) agreement, the Rule operates to limit the court by binding it to the bargain.[101] Once bound by the agreement, the panel held, the court cannot impose a sentence other than the one that appears in the agreement "unless the terms of the plea agreement are equivocal."[102] In short, absent express agreement by the parties, district courts cannot alter a sentence imposed via 11(c)(1)(C) agreement—a conclusion that "applies

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91 Id.
92 *Hemminger*, 1997 WL 235838 at *1.
93 See notes 48–50 and accompanying text.
94 1998 WL 30793 (9th Cir).
95 Id at *1.
96 See 18 USC § 3553(e).
97 359 F3d 369 (6th Cir 2004).
98 Id at 370.
99 Id at 373.
100 Id at 375.
101 *Peveler*, 359 F3d at 375 ("[A] rule of criminal procedure can limit a court's authority.").
102 Id at 377 (quotation marks and citation omitted).

despite the retroactivity of a subsequent amendment to a relevant guideline utilized to determine the defendant's sentence."[103]

B. The Circuit Split

With the enactment of the crack amendments, courts began to confront the interaction of retroactive amendments and binding plea agreements with greater frequency, and their once uniform conclusion soon dissolved into disagreement.

1. Split circuits and back again.

The Fourth Circuit broke with the other circuits in *United States v Dews*,[104] holding that "[n]othing in [FRCrP 11(e)(1)(C)] precludes a defendant pleading guilty under that rule from receiving the benefit of a later favorable retroactive amendment to the guidelines."[105] The defendants' identical Category I plea agreements stipulated to sentences of 168 months, which matched the low end of the range in the presentence report provided to the judge at sentencing (168 to 210 months).[106] Accepting the plea agreements, the district judge expressly referenced the Guidelines: "I will accept the recommendation in the plea agreement. It's within the guidelines."[107] In light of this record, the Fourth Circuit posited an interpretation of § 3582(c)(2) that every other circuit to address the question had summarily rebuffed—that "a sentence may be *both* a guidelines-based sentence eligible for treatment under § 3582(c)(2) and a sentence stipulated to by the parties in a plea agreement pursuant to Rule 11(e)(1)(C)."[108]

The court based its conclusion on the fact that § 3582(c)(2)'s "based on" requirement fails to state that the subsequently amended Guidelines range must be the *sole* basis for a defendant's sentence in order to trigger eligibility under § 3582. *Dews* acknowledged that the district court was bound by the parties' bargain, but reasoned that "the parties' bargains might have, but did not, address the future application of § 3582(c)(2)."[109] The agreements stipulated that the defendants would plead guilty if the court would sentence them to a term of 168 months; the parties did *not* agree that the defendants would abstain from seeking relief if the crack Guidelines were

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103 Id at 379.

104 551 F3d 204 (4th Cir 2008), rehearing en banc granted (4th Cir Feb 20, 2009), rehearing dismissed as moot (4th Cir May 4, 2009).

105 Id at 209.

106 Id at 207.

107 Id.

108 *Dews*, 551 F3d at 209.

109 Id at 211.

amended at some point in the future.[110] Thus, the district court, consistent with its obligation to give effect to the parties' bargain, was free to grant the defendants relief under § 3582(c)(2).[111]

Judge G. Steven Agee dissented, countering that the defendants failed to meet the threshold jurisdictional requirement of § 3582(c)(2) because a sentence arising from a binding plea agreement cannot be "based on" the Guidelines.[112] The dissent then accused the majority of awarding the defendants "an ex post contract addition" that enabled them to "keep all the benefits of the plea agreement . . . [while] claim[ing] a benefit which they failed to include in their contract."[113] Contrary to the majority's conclusion, the dissent argued that the court could not grant a sentence-reduction motion unless the agreement included an express provision granting the defendants permission to enjoy the benefits of future Guidelines amendments.[114] In the dissent's view, the prudent default rule would be that defendants waive the right to benefit from future amendments unless their plea agreements expressly provide otherwise: "A plea agreement, like any contract, allocates risk. And the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompanies a guilty plea."[115]

This circuit split was short-lived. Two months after handing down its opinion in *Dews*, the Fourth Circuit voted to rehear the case en banc,[116] vacating its earlier opinion. But before the court had the opportunity to rehear the case en banc and issue a final judgment, the defendants were released from prison, prompting the court to dismiss the case as moot.[117] As a matter of law, then, the *Dews* opinion was a nonoccurrence. But its reasoning abides, and courts continue to cite this "nonexistent" case as persuasive authority.[118]

2. Toeing the majority line.

Meanwhile, most circuits continued to adhere to the distinction espoused in the early cases: sentences that stem from binding plea agreements are exclusively based on the agreements, so § 3582(c)(2) cannot apply. The Second Circuit cast the issue as "a matter of statutory

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110 Id.

111 Id.

112 *Dews*, 551 F3d at 212 (Agee dissenting).

113 Id at 215.

114 Id at 217–18.

115 Id at 218.

116 Order, *United States v Dews*, No 08-6458, *1 (4th Cir Feb 20, 2009).

117 Order, *United States v Dews*, No 08-6458, *1 (4th Cir May 4, 2009).

118 See, for example, *United States v Cobb*, 584 F3d 979, 984 (10th Cir 2009); *United States v Coleman*, 594 F Supp 2d 164, 167 (D Mass 2009).

interpretation" in *United States v Main*,[119] holding that the court had no authority to reduce the defendant's sentence because it was based on the parties' plea agreement and not the subsequently lowered crack Guidelines.[120] The plea agreement called for a prison term not exceeding 96 months, though the defendant's applicable Guidelines range was 120 to 150 months.[121] In denying the defendant's § 3582 motion for reduction, the Second Circuit determined that "the provision that the Sentencing Commission subsequently modified[] *played no role* in the sentence that Main received."[122]

The Eighth Circuit likewise resolved in *United States v Scurlark*[123] that § 3582(c)(2) becomes inoperative once the court accepts a Rule 11(c)(1)(C) plea, stressing "the contractual nature of the agreement."[124] In their plea agreement, the parties agreed to an offense level and criminal history category rendering a Guidelines range of 151 to 188 months.[125] The agreement bound the parties to the calculated sentencing range and recommended a 40 percent downward departure from it, a recommendation that the district court accepted.[126] Having received a Category II sentence of 100 months, the defendant later moved for a reduction in light of Amendment 713.[127] Arguing that the crack amendments reduced his sentencing range to 121 to 151 months, the defendant asked the court to apply the 40 percent reduction to his new range.[128] The district court rebuffed his request, and the Eighth Circuit affirmed, reasoning that each party offered concessions to reach the agreement, which the district court was free to accept or reject, but that once the court accepted the plea, "§ 3582 became inapplicable because [the] sentence was based on the agreement."[129]

The Third Circuit also adopted the majority position in *United States v Sanchez*,[130] but over a vigorous dissent. Writing for the court, Judge Kent Jordan held that "Sanchez's sentence was the result of a binding plea agreement and is therefore not subject to reduction under 18 U.S.C. § 3582(c)(2)."[131] Still, the opinion indulged the question

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119 579 F3d 200 (2d Cir 2009), cert denied, 130 S Ct 1106 (2010).

120 579 F3d at 201, 203.

121 Id at 202. The agreement also reserved the defendant's right to move for a downward departure, which the court accepted, imposing a sentence of 84 months. Id.

122 Id at 204 (emphasis added).

123 560 F3d 839 (8th Cir 2009), cert denied, 130 S Ct 738 (2009).

124 560 F3d at 842.

125 See id at 840.

126 Id.

127 Id.

128 *Scurlark*, 560 F3d at 840–41.

129 Id at 842.

130 562 F3d 275 (3d Cir 2009), cert denied, 130 S Ct 1053 (2010).

131 *Sanchez*, 562 F3d at 279.

of the meaning of the phrase "based on," noting in dicta that nothing in the record indicated that the district court based its sentence on any Guidelines calculation.[132]

Writing in dissent, Judge Jane Roth argued in favor of a sentence reduction. First, she criticized the majority's disparate treatment of defendants who choose to go to trial and those who plead guilty. Noting that "a jury verdict is also binding on the parties," Judge Roth concluded that "the binding effect of the factors leading up to the judgment should not preclude the application of § 3582(c)."[133] More importantly, Judge Roth disagreed with the majority's holding on contractual grounds, stating bluntly, "I do not see how permitting a defendant to later seek resentencing under § 3582(c)(2) destroys this bargain."[134] Echoing *Dews*, she argued that the baseline assumption should be that the defendant has not waived his right to seek resentencing.[135] Reasoning that a presumption of waiver would be inconsistent with the background principles of plea bargaining—what this Comment refers to as the "contracts plus" framework—Judge Roth maintained that "waiver must be specifically bargained for, just like the waiver of a defendant's right of appeal or other possible terms of a plea agreement."[136] Finally, she observed that the defendant's offense would translate to a Guidelines range of 97 to 121 months, and that the defendant's plea agreement stipulated a sentence of 120 months.[137] In light of the fact that the agreed-upon sentence was within the Guidelines range, Judge Roth concluded that "it strain[ed] credulity to imagine that the plea agreement was not based on the Guidelines."[138]

3. Seventh and Ninth Circuits in flux?

Despite precedent seemingly dispositive of the issue, the Seventh and Ninth Circuits have recently equivocated on the question of binding plea agreements and retroactive Guidelines amendments.[139] In *United States v Bride*,[140] the Ninth Circuit reviewed the

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132 Id at 282 ("We could speculate about how they came to that number, but it would be pure speculation.").

133 Id at 283 (Roth dissenting).

134 Id.

135 *Sanchez*, 562 F3d at 283 (Roth dissenting).

136 Id.

137 Id at 284.

138 Id.

139 See also *United States v Goins*, 355 Fed Appx 1, 6 (6th Cir 2009) (White concurring) (agreeing to reaffirm *Peveler*'s holding on stare decisis grounds but observing that "[n]othing in the statute or policy statements supports the conclusion that Congress intended to exclude sentences that were based on the Guidelines, but imposed pursuant to Rule 11(c)(1)(C) plea agreements").

140 581 F3d 888 (9th Cir 2009), cert denied, 130 S Ct 1160 (2010).

denial of a reduction motion submitted by an offender who had been sentenced to a term of imprisonment eleven years less than the low end of his applicable Guidelines range.[141] The district court agreed with the defendant that there was "a nexus between the Guidelines and the plea," but nevertheless denied the § 3582(c)(2) motion because the defendant had pleaded to a Rule 11(c)(1)(C) agreement.[142] The Ninth Circuit affirmed without adopting the district court's per se rule—the same rule that the circuit had itself announced a decade earlier in *McKenna*.[143] Instead, the court determined that consideration of the Guidelines during plea negotiations is insufficient on its own to establish the necessary nexus between the Guidelines and the plea.[144] The terms of the agreement itself must establish that the sentence was based on a subsequently lowered sentencing range, and in this case that connection did not exist.[145] In so holding, the court left open the possibility that it would approve of reducing a plea-bargained sentence under different circumstances and—unlike in *McKenna*—explicitly refrained from answering the question of whether Rule 11(c)(1)(C) absolutely bars relief under § 3582(c)(2).[146]

The Seventh Circuit's retreat from a bright-line rule is even more surprising. For not only had the court spoken conclusively on the issue in its unpublished decision in *Hemminger*, but it also reaffirmed in a later published opinion its conclusion that 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."[147] Nevertheless, the court concluded in *United States v Ray*[148] (albeit in the context of denying the defendant's motion to reduce his Category III agreement) that a sentence imposed pursuant to a binding plea agreement "cannot be said to be 'based on'" the Guidelines "[i]n the absence of explicit language in the agreement to the contrary."[149] By implication, then, under certain circumstances, a Rule 11(c)(1)(C) sentence *could* be "based on" the Guidelines.

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141 581 F3d at 889.

142 Id at 890.

143 Of course, *McKenna* was an unpublished opinion and thus had limited precedential value (although it was cited by both the Fourth and Eighth Circuits, in *Dews*, 551 F3d at 210, 217, and *Scurlark*, 560 F3d at 841 n 2, respectively).

144 See *Bride*, 581 F3d at 891.

145 Id.

146 Id at 891 n 5.

147 *United States v Cieslowski*, 410 F3d 353, 364 (7th Cir 2005).

148 598 F3d 407 (7th Cir 2010).

149 Id at 411.

The court went a step further in *United States v Franklin*.[150] Facing a Guidelines range of 262 to 327 months, the defendant accepted a binding plea agreement calling for a sentence of 157 months,[151] a Category III plea agreement. Moving for a § 3582(c)(2) reduction, the defendant attempted to recast the sentence as 40 percent less than the low end of his range.[152] The Seventh Circuit affirmed the district court's denial of his motion, but in doing so emphasized that it no longer intended to abide by a bright-line rule that sentences imposed pursuant to binding plea agreements cannot be reduced in light of subsequent Guidelines amendments:

> We make clear, however, that our decisions today and in *Ray* do not mean that all Rule 11(c)(1)(C) plea agreements foreclose relief under section 3582(c)(2). If, for example, Franklin's plea agreement had provided that the term of imprisonment was to be "40% below the low end of the guidelines range," or had agreed that "the defendant will receive the low end of the applicable guideline range," then the government agrees that the plea would be "based on" a guidelines range for section 3582(c)(2) purposes.[153]

The court has yet to face a § 3582(c)(2) motion to reduce a Category I or II sentence post-*Franklin*, but the Seventh Circuit appears poised to allow reduction of a sentence fixed pursuant to a binding plea agreement.

4. A coup for resentencing.

As noted in the Part II.A, the Tenth Circuit was the first to hold that a defendant who enters into a binding a plea agreement is ineligible for a reduction under § 3582(c)(2) because Rule 11(c)(1)(C) divests district courts of jurisdiction to consider the motion for reduction.[154] Over the ensuing fifteen years, it affirmed that holding on numerous occasions—including four times in 2009 alone.[155] Yet in October 2009, the court drastically and unexpectedly reversed course, holding in

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150 600 F3d 893 (7th Cir 2010).

151 Id at 894–95.

152 Id at 896.

153 Id at 897.

154 See *Trujeque*, 100 F3d at 869.

155 All were unpublished opinions. See *United States v Goudeau*, 341 Fed Appx 400, 402 (10th Cir 2009); *United States v Fields*, 339 Fed Appx 872, 874 (10th Cir 2009); *United States v Gage*, 315 Fed Appx 48, 49 (10th Cir 2009); *United States v Gonzales*, 308 Fed Appx 251, 252 (10th Cir 2009).

United States v Cobb[156] that, under certain circumstances, Guidelines amendments provide district courts with authority to reduce sentences imposed pursuant to binding plea agreements.[157]

The parties in *Cobb* negotiated a Category I agreement specifying that the defendant's sentence would be "determined by application of the sentencing guidelines," stipulating a sentencing range of 168 to 210 months, and calling for the imposition of a 168 month term of imprisonment—the bottom of the Guidelines range.[158] The majority opinion spent the bulk of its time distinguishing *Trujeque*,[159] while the dissent argued that *Trujeque* controlled.[160] Framing the question before the court in *Cobb* as one of first impression,[161] the majority argued that *Trujeque* was inapposite because it dealt with a stipulation to a sentence outside the applicable Guidelines range.[162] Here, by contrast, the sentencing disposition "was tied to the guidelines at every step," and thus looked more analogous to *Dews* than to *Trujeque*.[163] Adopting the Fourth Circuit's reasoning in *Dews*, the Tenth Circuit held that "nothing in the language of § 3582(c)(2) or in the language of Rule 11 precludes a defendant who pleads guilty under Rule 11 from later benefiting from a favorable retroactive guideline amendment."[164]

In reaching its conclusion, the Tenth Circuit eschewed the contract arguments relied upon by numerous opinions, including its own opinion in *Trujeque*.[165] The court focused instead on statutory interpretation and legislative intent, reasoning that contract analysis "misdirect[s] our focus from the reasonable interpretation that Congress did not intend to keep negotiated plea agreements . . . from the reach of § 3582."[166] Not only, it reasoned, does the plain language of the statute allow for sentence reductions "based in any way on a qualifying range," but a narrow interpretation of the statute would also undermine the USSC's

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156 584 F3d 979 (10th Cir 2009), rehearing en banc granted, 595 F3d 1202 (10th Cir 2010), rehearing order vacd and panel opinion reinstated, 603 F3d 1201 (10th Cir 2010).

157 584 F3d at 985.

158 Id at 981.

159 Id at 983.

160 Id at 988 (Hartz dissenting) ("Although that case differs from this one in that the stipulated sentence was outside the guidelines sentencing range, our opinion did not rely on that feature of the case.").

161 *Cobb*, 584 F3d at 982 (majority).

162 See id at 983.

163 Id at 983–84 ("[T]the parties negotiated the stipulated sentence to be a guideline-range sentence.").

164 Id at 984 (concluding that a sentence "need not be based *solely* upon a qualifying sentencing range to fall within the reach of § 3582").

165 *Cobb*, 584 F3d at 984–85 ("Implicitly, in *Trujeque* and our later cases relying upon it, we have imported contract analysis into our application and interpretation of § 3582. But we lack statutory or guideline authority for doing so.").

166 Id at 985.

objective of mitigating the crack-powder disparity.[167] Finally, echoing Judge Roth's dissent in *Sanchez*, the majority lambasted as "simply unrealistic" any claim "that the applicable guideline range is not a major factor (if not *the* major factor) in reaching a stipulated sentence."[168]

The dissent criticized the majority's statutory interpretation, countering that such an approach would "render[] impotent" the statute's "based on" requirement, because parties virtually always take the Guidelines into account to some degree at some point during the negotiations.[169] Under Judge Harris Hartz's preferred construction of the statute, it is irrelevant whether the parties considered the Guidelines during plea negotiations, because no sentence stipulated "to a specific term required by a plea agreement under [FRCrP] 11(c)(1)(C)" can ever be "based on" the Guidelines for the purposes of § 3582(c)(2).[170]

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Over the span of just a few months, the answer to the question whether a sentence imposed pursuant to a binding plea agreement can ever be reduced in light of future Guidelines amendments shifted from a resounding "no" to the subject of genuine controversy. The Tenth Circuit has already retreated from a decade and a half of precedent, while the Seventh and Ninth Circuits appear to be rethinking their respective commitments to the majority stance. And although the Fourth Circuit has not (technically) taken a position on the subject of the circuit split, it sided with the Tenth Circuit the only time it had occasion to consider the question. Whether this amounts to a legitimate trend away from the majority position remains to be seen. But one thing is clear: when subjected to careful scrutiny, a per se rule precluding district courts from reducing sentences imposed pursuant to binding plea agreements falters both as a matter of statutory interpretation and of contract law.

III. STATUTORY INTERPRETATION

Careful parsing of § 3582 and the Guidelines leads to the conclusion that the majority position—that sentences imposed via binding plea agreements are not "based on" the Guidelines and thus not

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167 Id ("If we categorically removed Rule 11 pleas from the reach of § 3582, it would perpetuate the very disparity § 3582 and the retroactive application of Amendment 706 were meant to correct.").

168 Id.

169 *Cobb*, 584 F3d at 987 (Hartz dissenting).

170 Id at 985.

eligible for reduction if the applicable Guidelines are subsequently amended—is untenable. Nothing in the words of the statute proscribes the application of § 3582(c)(2) to binding plea agreements. In fact, in the majority of cases, granting a defendant's motion for reduction both comports with the words of Congress and the USSC and gives effect to their intentions.

This Part argues that, although the plain language of § 3582(c)(2) is ambiguous, both its legislative history and its interpretation by the USSC counsel against the bright-line rule employed by the majority of courts and in favor of an interpretation of the statute's "based on" requirement under which a sentence can be both "based on" the Guidelines and fixed pursuant to binding plea agreement. Indeed, the USSC's sentence-reduction policy statement indicates that a sentence—even if imposed pursuant to a binding plea agreement—should be eligible for reduction so long as (1) the court can find sufficient evidence of the defendant's applicable Guidelines range in the final sentence, and (2) in working backward from the sentence to the applicable Guidelines range, the court is not obstructed by "the operation of another guideline or statutory provision."[171] Consequently, all Category I, most Category II, but few Category III agreements should be eligible for reduction when the Guidelines are amended retroactively.

A. "Based On" the Guidelines

Section 3582 puts forth a two-part test for determining whether a defendant can move for a sentence reduction: (1) the sentence has to be "based on" a sentencing range subsequently lowered by the USSC; and (2) the reduction must be consistent with applicable policy statements issued by the USSC. Analysis of the first part of this test is fraught with difficulty.

1. Interpreting the statute.

The first step in any effort to construe a statute is to examine its "plain meaning."[172] Nothing in *this* statute, however, indicates precisely what level of reliance—for example, "exclusively based on," "largely based on," or "based at least in part on"—is necessary for a sentence to be "based on" the Guidelines.[173] Considering that the statute does

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171 USSG § 1B1.10, Application Note 1.

172 See, for example, *Caminetti v United States*, 242 US 470, 485 (1917) (calling it "elementary" that if the language of the statute is plain, "the sole function of the courts is to enforce it according to its terms").

173 See *United States v Goins*, 355 Fed Appx 1, 6 (6th Cir 2009) (White concurring) ("The statutory language . . . can be fairly understood to support either result.").

not stipulate that the Guidelines must be the "sole basis" of the sentence, nor require that the sentence "reflect" or fall "within" the applicable Guidelines range, the minority position is probably stronger. But as Judge Richard Posner remarked during a recent oral argument on this issue, "we're not going to get anywhere with the plain language . . . because it's ambiguous."[174]

When faced with ambiguous statutory language, courts often look next to legislative history and intent.[175] The Senate Report that serves as the principal source of legislative history on the SRA only twice references § 3582(c)(2). Characterizing the provision as one of a few "safety valves" in the Guidelines, the report recounts the Appropriations Committee's "belie[f] that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances."[176] One unusual circumstance prompting the need for this provision is when "the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment."[177] Surely nothing in this language prevents § 3582 from being applied to sentences imposed pursuant to plea agreements. It is enlightening that the Senate, in clarifying its intent with respect to § 3582, required only that the Guidelines for the offense "of which the defendant was *convicted*" have been reduced, as opposed to the Guidelines according to which the defendant was *sentenced*. This distinction is significant: because a guilty plea is a conviction,[178] any offender who pleaded guilty to a crack offense qualifies under the "offense of which the defendant was convicted" standard, even if the resulting sentence does not fall within the Guidelines range for the crack offense.

Later, the Senate Report notes that the value of this safety valve provision "lies in the fact that [it] assure[s] the availability of specific review and reduction of a term of imprisonment . . . to respond to changes in the Guidelines."[179] Denying specific review to a significant percentage of persons charged with the offense whose Guidelines

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174 Oral Argument, *United States v Ray*, No 09-2392, 00:03:28 (7th Cir Oct 30, 2009), online at http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=09-2392&submit=showdkt&yr=09&num=2392 (visited June 2, 2010).

175 See William N. Eskridge, Jr, Philip P. Frickey, and Elizabeth Garrett, *Legislation: Statutes and the Creation of Public Policy* 101–02, 793 (West 4th ed 2007). But see Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533, 547 (1983).

176 Comprehensive Crime Control Act of 1984, S Rep No 98-225, 98th Cong, 2d Sess 55 (1983), reprinted in 1984 USCCAN 3182, 3238. See also *Dillon v United States*, 130 S Ct 2683, 2692 (2010) ("[Section] 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines.").

177 S Rep No 98-225 at 55–56 (cited in note 176).

178 See USSG § 1B1.2(c).

179 S Rep No 98-225 at 121 (cited in note 176).

have been amended—that is, those who accepted binding plea agreements—does little to respond to changes to the Guidelines.[180] Failing to ensure the allocation of benefits to defendants who chose to plead guilty would also conflict, or at least interact perversely, with the Guidelines' general encouragement of guilty pleas.[181] In short, analysis of the legislative history weighs in favor of allowing reductions.

2. Looking to the Guidelines.

By requiring that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission,"[182] Congress clarified that its intent in enacting the sentence-reduction statute was to execute the intent (and defer to the expertise) of the USSC. The Supreme Court recently affirmed this understanding of the SRA in *Dillon v United States*,[183] the Court's first decision interpreting § 3582(c)(2). In *Dillon*, the Court held that even "after *Booker*, the Commission retains at least some authority to bind the courts."[184] Although the Guidelines themselves are now advisory, courts must treat the dictates of USSG § 1B1.10, the Commission's sentence-reduction policy statement, as mandatory.[185] Notably for the purposes of this Comment, the Court determined that the USSC has exclusive authority to designate "whether and to what extent an amendment will be retroactive."[186] Thus, when attempting to determine how a sentence interacts with the Guidelines, it is vital to ascertain precisely what the Commission envisioned.

To begin, the USSC's stated purpose in enacting Amendment 706's two-level reduction was to reduce the crack-powder disparity, a purpose that the Commission described as "urgent and compelling."[187] That a defendant accepted a plea agreement in no way changes the fact that the defendant was sentenced in the shadow of the crack-powder disparity. That is, a similarly situated defendant (with the same criminal history and the same drug quantity) who happened to be in possession of powder rather than crack cocaine would likely have received a lesser sentence pursuant to a binding plea agreement, as the jumping-off point provided by the original Guidelines would have been correspondingly

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180 See note 167.
181 See USSG § 3E1.1 (reducing defendants' offense levels in exchange for guilty pleas).
182 18 USC § 3582(c)(2).
183 130 S Ct 2683 (2010).
184 Id at 2693.
185 Id at 2683.
186 Id at 2691.
187 See note 59 and accompanying text.

lower.[188] Allowing for sentence reduction in the plea agreement context therefore promotes the aim of Amendment 706.

More concretely, the USSC offers no support for the proposition that a Rule 11(c)(1)(C) sentence cannot be "based on" the Guidelines. Like the Senate Report, the Commission phrases the threshold sentence-reduction question—that is, the "based on" question—as whether an amendment "lowers the applicable guideline range."[189] The Commission's interpretation of § 3582(c)(2)'s "based on" language does not consider the degree to which the sentence ultimately imposed relied on the Guidelines, only whether the amendment, if in place at the time that the defendant committed his offense, would have lowered his applicable Guidelines range. This obviates the difficulty of determining whether a sentence imposed via plea bargain demonstrates sufficient reliance on the Guidelines (exclusively based on, largely based on, and so on).[190] After all, none of the cases has ever questioned whether the amendment reduced a defendant's applicable Guidelines range.

Once eligibility for reduction is triggered by an amendment that lowers the Guidelines range, the USSC lists two, and only two, circumstances in which a reduction is *not* authorized under § 3582 and *not* consistent with the policy statement: (1) the amendment is not applicable to the defendant; or (2) the amendment is applicable but does not have the effect of lowering the defendant's Guidelines range because of the operation of another guideline[191] or statutory provision.[192] Significantly, the USSC does *not* mention plea agreements. Any argument that plea agreements fall under the ambit of "the operation of another . . . statutory provision" fails immediately, for the Federal Rules of Criminal Procedure are not statutes. Thus, the Commission offers no support for the argument that sentences imposed pursuant to binding plea agreements cannot be "based on" the Guidelines.

In short, although its plain language is ambiguous, § 3582(c)(2)'s legislative history and the USSC's interpretation of this statute indicate that the "based on" inquiry for a defendant who accepted a Rule 11(c)(1)(C) agreement is no different than it is for a defendant who received a non–plea bargained sentence. This means that courts must examine both the record of the sentencing proceedings and the text of

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188 See *Cobb*, 584 F3d at 983; Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 Harv L Rev 2463, 2515–19 (2004).

189 USSG § 1B1.10, Application Note 1.

190 See note 173 and accompanying text.

191 For example, the career offender Guidelines. See USSG § 4B1.1.

192 For example, § 3553(a) or a mandatory minimum term of imprisonment. See USSG § 1B1.10, Application Note 1.

the plea agreement to determine how the sentence interacts with the applicable Guidelines range.[193] Important factors include whether the agreement "shows its work" (meaning the basis for the calculation is detailed) and the judge's explanation for accepting a sentence below the applicable Guidelines range.[194]

Ultimately, a Rule 11(c)(1)(C) defendant's sentence is "based on" the Guidelines so long as it was not set by the operation of a guideline or statutory provision apart from the typical Guidelines application procedures.[195] In other words, if the sentence enshrined in the plea is reached by (1) calculating the defendant's base offense level and criminal history category (which when combined produce an applicable Guidelines range) according to the crack cocaine Guidelines, and (2) adjusting the sentence as provided by USSG § 1B1.1 (including Chapter Three reductions like acceptance of responsibility and Chapter Five departures like substantial assistance to authorities), then it is a "Guidelines" sentence necessarily "based on" the Guidelines. If, however, the sentence calculation involved exogenous sources like a statutory mandatory minimum,[196] § 3553(a),[197] or the "career offender" Guidelines,[198] then the resulting sentence is *not* "based on" the Guidelines.

One could argue that reducing plea-bargained sentences raises a potential double-counting problem: these defendants may already have received sentence reductions to counteract the crack-powder disparity. In other words, a judge may have accepted a below-Guidelines plea agreement in part because she disagreed in principle

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193 See *United States v Garcia*, 606 F3d 209, 214 (5th Cir 2010) ("The jurisdictional question is whether the sentence was 'based on' the subsequently amended crack-offense guidelines, and answering that question requires that we examine the nuances of both the plea agreement and the sentencing transcript in each particular case.").

194 One factor that should *not* bear on this question is whether the government engaged in "charge bargaining," because the Guidelines explicitly permit judges to take dropped charges into account at sentencing. See USSG § 6B1.2(a). See also note 25. Because real-offense conduct factors into the applicable Guidelines range, the "based on" inquiry for charge-bargained pleas is no different from any other. The judge is required to state her reasons for accepting a below-Guidelines plea agreement, USSG § 6B1.2, so if the judge discounted the real-offense conduct from bargained-away charges, it should appear on the record. Whether district judges actually do so is an empirical question beyond the scope of this Comment. See note 34.

195 These procedures are set forth in USSG § 1B1.1.

196 See USSG § 1B1.10, Application Note 1.

197 See USSG § 1B1.10(b)(2)(B).

198 When a crack defendant's criminal history triggers the career offender provision, USSG § 4B1.1, his applicable Guidelines range is no longer set by the crack cocaine Guidelines, USSG § 2D1.1(c). Instead, the applicable range is set by the career offender Guidelines. See *United States v Darton*, 595 F3d 1191, 1195 (10th Cir 2010). Accordingly, the amendments to the crack Guidelines would not lower his applicable Guidelines range, and thus he could not avail himself of § 3582(c)(2). See, for example, *United States v Tolliver*, 570 F3d 1062, 1066 (8th Cir 2009).

with the crack-powder disparity, and thus a crack offender may have already received a sentence reduction to account for it.

But this argument is unavailing. Although it is permissible for courts to impose (or, in the case of 11(c)(1)(C) agreements, accept) below-Guidelines sentences solely on the basis of policy disagreements with the crack-powder disparity, judges who exercise that discretion do so pursuant to § 3553(a).[199] And the Guidelines state unequivocally that courts should not grant § 3582(c)(2) reductions for defendants whose sentences were initially determined pursuant to § 3553(a).[200]

B. The Applicable Policy Statement

Even if a sentence imposed via binding plea agreement is found to be "based on" the Guidelines, it still must be "consistent with applicable policy statements issued by the Sentencing Commission" to be eligible for reduction.[201] As explained in Part I, the applicable policy statement, "Reduction in Term of Imprisonment as a Result of Amended Guideline Range,"[202] sets forth as the determinative factor whether a sentence is a Guidelines or non-Guidelines sentence. Obviously a sentence within the applicable Guidelines range qualifies as a "Guidelines sentence." But a non-Guidelines sentence is *not* simply one that falls outside the defendant's applicable Guidelines range. The policy statement explains:

> 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*, a further reduction generally would not be appropriate.[203]

Thus, a below-Guidelines sentence can still be a "Guidelines" sentence eligible for reduction. In fact, the policy statement specifically mentions that, for a defendant whose initial sentence represents a 20 percent downward departure from the minimum term provided by the applicable Guidelines range, "a comparable reduction [ ] may

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199 See *Kimbrough*, 552 US at 106–08.
200 USSG § 1B1.10(b)(2)(B).
201 18 USC § 3582(c)(2).
202 USSG § 1B1.10.
203 USSG § 1B1.10(b)(2)(B) (citation omitted).

be appropriate."[204] When the policy statement speaks of "non-guideline" sentences, it refers to terms of imprisonment determined pursuant to § 3553(a).

The policy statement therefore assumes that when a sentence is defined as a departure of a specified percentage from the Guidelines, the deviation from the applicable range is probably *not* the result of § 3553(a).[205] As one district judge noted, "if there is an agreed sentence based on a guideline calculation, like 20 percent of the low end of the guidelines, then with the new crack amendments we go down and we recalculate it. We've been doing those by agreement pretty routinely."[206] More likely, then, the USSC assumes that percentage reductions from the low end of an applicable Guidelines range reflect downward departures determined pursuant to the Guidelines (presumably USSG § 5K1.1 reductions for substantial assistance).[207] Only if the sentence was determined pursuant to § 3553 and *Booker*, or bears no apparent relationship to the applicable Guidelines range such that a court could not confidently determine that the defendant's applicable range derived from the crack Guidelines,[208] should a sentence be classified as "non-Guidelines."

C. Applying the Test

The test for determining whether a defendant who pleaded guilty to a crack offense pursuant to Rule 11(c)(1)(C) is eligible for a

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204 USSG § 1B1.10, Application Note 3.

205 See *Franklin*, 600 F3d at 896–97 (explaining that the court could not reduce the sentence set by the defendant's Category III agreement, but that if the agreement had been a Category II "provid[ing] that the term of imprisonment was to be '40% below the low end of the guidelines range,' . . . then the government agrees that the plea would be 'based on' a guidelines range for section 3582(c)(2) purposes").

206 Id at 897 (quoting Judge Robert Gettleman at the district court hearing on the § 3582(c)(2) motion).

207 See, for example, *United States v Stewart*, 595 F3d 197, 201 (4th Cir 2010). There is strong evidence to suggest that many of these unexplained Guidelines-based departures—which, in the binding plea agreement context, fall into Category II—are the result of substantial assistance departures. First, substantial assistance departures are quite common. See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 67 (Oct 2003), online at http://www.ussc.gov/departrpt03/departrpt03.pdf (visited Apr 10, 2010); USSC, *Post-*Kimbrough*/*Gall *Data Report* table 1 (Feb 2009), online at http://www.ussc.gov/USSC_Kimbrough_Gall_Report_Final_FY2008.pdf (visited Apr 10, 2010). Second, unlike most departures, substantial assistance departures do not reduce a defendant's base offense level by a given number of levels. Compare USSG § 5K1.1(a) ("The appropriate reduction shall be determined by the court.") with USSG § 3B1.2(a) ("If the defendant was a minimal participant in any criminal activity, decrease by 4 levels."). Notably, substantial assistance departures can be phrased as percentage departures from the low end of the applicable range. See, for example, *United States v Lindsey*, 556 F3d 238, 245–46 (4th Cir 2009) (explaining that courts can use a lower offense category, a percentage, or a flat number of months to calculate a substantial assistance departure).

208 See *United States v Ray*, 598 F3d 407, 409 (7th Cir 2010).

sentence reduction can thus be collapsed into the following: (1) Category I agreements are always eligible for reduction; (2) Category II agreements are eligible for reduction, *unless* the government demonstrates that the sentence was determined pursuant to § 3553; and (3) Category III agreements are not eligible for reduction, *unless* the defendant demonstrates that the sentence was *not* determined pursuant to § 3553. This prescription reflects the assumption that when a binding plea agreement is silent on the derivation of a below-Guidelines sentence, Category II agreements most likely reflect substantial assistance departures, which do not impede § 3582(c)(2), while Category III agreements most likely contain § 3553 sentences. Adopting these rebuttable presumptions solves the problem of how to determine whether a sentence is "non-Guidelines" absent any concrete evidence in the record:[209] Category II agreements, in light of their explicit reference to the Guidelines and their treatment in USSG § 1B1.10, should be presumptively "based on the Guidelines," while Category III agreements should be presumptively non-Guidelines due to their lack of explicit reliance on the defendant's applicable Guidelines range. Drawing lines in this manner also comports with Congress's specific intent to provide a safety valve "to respond to changes in the Guidelines,"[210] as well as the Commission's goal of mitigating the effects of the crack-powder disparity for all offenders whose sentences stem from the subsequently amended guideline.

The key question is whether the court can, working backward from the implemented sentence, draw an unbroken line back to the applicable Guidelines range without being obstructed by the operation of an unrelated statutory or Guidelines provision. For Category II agreements, the link between the sentence and the applicable range is clear, so absent evidence that the agreement considered § 3553, sentence reduction satisfies the requirements of § 3582. For Category III agreements, however, absent any evidence to the contrary, the connection between the sentence and the Guidelines is simply too tenuous and speculative to support an inference that the sentence was "based on" the Guidelines. When it is impossible to "find" a defendant's applicable Guidelines range in the sentence imposed, courts have no choice but to assume that they are dealing with a "non-Guidelines" sentence.

It is important to note that explicitly referring to the Guidelines at sentencing or in the plea agreement will not affect the outcome of the inquiry. There is no talismanic power in mentioning the Guidelines—a

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209 See note 34.

210 See note 179 and accompanying text.

welcome result considering the alternative would, frustratingly, simply replace one formalism with another. In Category II cases, the prosecution can still prove that the defendant received a "non-Guidelines" sentence. In Category III cases, the defendant can present evidence that his sentence was the result of a substantial assistance departure.[211] The vital point is that courts should utilize presumptions to ensure that, contrary to the current state of the law, defendants sentenced according to subsequently amended Guidelines are permitted to avail themselves of a sentencing "safety valve" specifically enacted by Congress—or, as the Supreme Court put it, "a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines"[212]—unless it is apparent that they received "non-Guidelines" sentences.

IV. CONTRACT INTERPRETATION

The analysis in Part III established that nothing in the applicable statutes or policy statement precludes district courts from entertaining § 3582(c)(2) motions filed by defendants who accepted binding plea agreements. That is, the sentence-reduction regime itself does not exclude binding plea agreements. But what about the plea agreements themselves? Might the fact that they are *binding* prevent courts from revising them, irrespective of the statutory interpretation question? Answering this question requires interpreting plea agreements. Part IV.A reviews the quasi-contractual framework used to construe plea agreements, deriving from it the concept of a "contracts plus" regime. Part IV.B then describes the interpretive problem at issue in the retroactive amendment cases, namely that the plea agreements did not specify whether the defendants had the right to seek sentence reductions if the crack Guidelines were amended in the future—in other words, that they failed to allocate the risk of future amendments to the Guidelines. It then applies the "contracts plus" framework, concluding that proper contract analysis favors allowing courts to apply § 3582(c)(2) to binding plea agreements.

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211 See *Kingsley v United States*, 968 F2d 109, 115 (1st Cir 1992), citing *United States v Garcia*, 956 F2d 41, 43–44 (4th Cir 1992) (holding that strict application of the parol evidence rule is not appropriate for the construction of plea agreements); *United States v Jefferies*, 908 F2d 1520, 1523 (11th Cir 1990) ("[T]he written [plea] agreement should not be interpreted to directly contradict an oral understanding.") (quotation marks omitted).

212 *Dillon*, 130 S Ct at 2692.

A. The "Contracts Plus" Framework

Plea agreements are construed as contracts.[213] Although the Tenth Circuit questioned the appropriateness of applying contract principles to the retroactive application of Guidelines amendments,[214] the Supreme Court has authorized courts to apply some version of contract principles to plea bargain interpretation, at least by way of analogy.[215] The more important—and open—question is how courts should appraise the relative bargaining power of the parties to plea agreements. After all, considering the liberty interests and constitutional rights at stake, a plea agreement is markedly different from an ordinary, arm's length contract for widgets. There is an inherent contradiction, grappled with in the literature, between the system's tolerance for plea bargaining and its commitment to allocating all burdens to the government.[216] Some scholars, like John Langbein, portray plea bargaining as inherently coercive and involuntary.[217] Others, like Judge Frank Easterbrook, view plea bargains as mutually beneficial compromises in which each side holds something that the other values, and prosecutors purchase "procedural entitlements with lower sentences."[218] In short, the balance of power between the government and the defense during plea negotiations is a contested issue.

There is tension in the cases as well. The Supreme Court initially stated that, in the typical plea negotiation, the prosecution and defense "possess relatively equal bargaining power."[219] Some justices have expressed concern over the prospect of utilizing contract law as anything more than "an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate . . . because plea agreements are constitutional contracts" and thus implicate the Due Process Clause in a manner that standard commercial contracts do

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213 *Puckett v United States*, 129 S Ct 1423, 1430 (2009); *Santobello v New York*, 404 US 257, 261 (1971).

214 See *Cobb*, 584 F3d at 984.

215 See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L J 1969, 1974 (1992).

216 See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 Am J Comp L 717, 723–29, 732 (Supp 2006) (reviewing the academic controversy over plea bargaining).

217 See generally John Langbein, *Torture and Plea Bargaining*, 46 U Chi L Rev 3 (1978) (arguing that there are "remarkable parallels in origin, in function, and even in specific points of doctrine" between plea bargaining and medieval torture practices).

218 Easterbrook, 101 Yale L J at 1975 (cited in note 215). Of course, several of these "procedural" entitlements are constitutionally protected rights, including trial by jury and confrontation of witnesses. See also Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L J 1909, 1913–17 (1992) (explaining that the general freedom to contract provides the basis for understanding why plea bargains "deserve a presumption of enforceability in the first place").

219 *Bordenkircher v Hayes*, 434 US 357, 362 (1978).

not.[220] A majority of the Court has gone only so far as to concede that the contract analogy "may not hold in all respects,"[221] and has never addressed "in any comprehensive way the rules of construction appropriate for disputes involving plea agreements."[222]

The task of setting interpretative parameters for plea agreements has therefore been left to the circuit courts, who have designated a sort of "contract law plus" system for interpreting plea agreements.[223] This means that the agreement is construed as a contract in which the defendant gets a slight advantage, not unlike the common law doctrine of *contra proferentem*, often applied to insurance contracts, under which ambiguous contract terms giving rise to two reasonable interpretations are construed against the drafter of the document.[224] Courts have characterized the defendant's slight advantage in different ways. For example, the Ninth Circuit calls directly for all ambiguities to be construed in the defendant's favor,[225] while the Seventh Circuit interprets plea agreements as contracts generally "supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause."[226]

When analyzing plea agreements, then, courts should begin by construing them through the lens of an ordinary, arm's length commercial contract. Once that initial analysis is complete, they should address any potential due process concerns.[227] If ambiguities remain, they should be construed in the defendant's favor. Hence, to determine whether defendants sentenced pursuant to binding plea agreements should be permitted to seek sentence reductions on account of subsequent Guidelines amendments, courts should look to the language of the plea agreements and apply "contracts plus" analysis.

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220 *Ricketts v Adamson*, 483 US 1, 16 (1987) (Brennan dissenting) (arguing that the principles that underlie the law of commercial contracts and plea agreements "are not coextensive").

221 *Puckett*, 129 S Ct at 1430.

222 *Ricketts*, 483 US at 16 (Brennan dissenting).

223 See *United States v Jones*, 569 F3d 569, 572 (6th Cir 2009); *United States v Watson*, 582 F3d 974, 986 (9th Cir 2009); *United States v Bullcoming*, 579 F3d 1200, 1205 (10th Cir 2009); *United States v Elashyi*, 554 F3d 480, 501 (5th Cir 2008); *United States v Ingram*, 979 F2d 1179, 1184 (7th Cir 1992).

224 See, for example, *Aetna Insurance Co v Boon*, 95 US 117, 128 (1877) ("[A]mbiguities should be construed most strongly against the underwriters, and most favorably to the assured."); *Carrizales v State Farm Lloyds*, 518 F3d 343, 346 (5th Cir 2008).

225 *Watson*, 582 F3d at 986.

226 *Ingram*, 979 F2d at 1184.

227 Because the contract at issue will deprive the defendant of his liberty, the Fifth Amendment requires that the court police the bargain for violations of fundamental fairness (for example, whether the defendant pled guilty voluntarily and intelligently). See *United States v Harvey*, 791 F2d 294, 300 (4th Cir 1986) ("[T]he defendant's underlying 'contract' right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.").

B. The Risk of Future Guidelines Amendments Should Be Allocated to the Government

Plea agreements, like all contracts, allocate risk.[228] Had the plea agreements underlying the cases discussed in Part II all included provisions expressly stipulating what would happen if the crack cocaine Guidelines were later amended, these would be much easier cases. The trouble is, the plea agreements in all of the cases are silent on the issue of subsequent amendments. In contract terms, the agreements failed to allocate the risk of a future retroactive amendment to the Guidelines that would lower the Guidelines range associated with the offense to which the defendant pleaded guilty. Because the agreements failed to allocate the risk ex ante, and someone has to bear the loss, courts are forced to allocate the risk ex post. The application of § 3582(c)(2) to Rule 11(c)(1)(C) plea agreements thus boils down to a simple question: who should bear the risk?[229]

This is precisely the issue dividing the majority and dissent in both *Dews* and *Sanchez*. In *Dews*, the majority reasoned that the defendants did not agree *not* to seek relief in the event the USSC retroactively amended the Guidelines to the defendants' benefit, so the plea agreements did not preclude them from taking advantage of a favorable amendment.[230] The dissent, meanwhile, contended that the defendants locked in what at the time was a favorable sentence in exchange for foregoing trial, and thus bore the risk of a favorable change in the law; any other interpretation would hand the defendants a windfall.[231] The *Sanchez* court featured the same arguments, but in reverse: the majority held that by agreeing to the 11(c)(1)(C) plea, the defendant waived his right to seek relief under § 3582,[232] while the dissent maintained that waiver of the right to move for a sentence reduction "must be specifically bargained for, just like the waiver of a defendant's right of appeal or other possible terms of a plea agreement."[233] In essence, this disagreement amounts to a dispute over how to deal with a missing term in what the parties assumed to be a fully integrated agreement.

Treating a plea agreement that fails to allocate the risk of a future Guidelines amendment as a purportedly integrated contract with

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228 See *United States v Ringling*, 988 F2d 504, 506 (4th Cir 1993).

229 Note, however, that the circuits are split on the threshold question of whether contract analysis should even be applied to the current controversy. See note 165 and accompanying text.

230 551 F3d at 211.

231 Id at 218 (Agee dissenting).

232 562 F3d at 281 n 7.

233 Id at 283 (Roth dissenting).

a missing term carries significant intuitive appeal.[234] After all, a plea agreement likely intends to memorialize the entirety of the parties' agreement, except that in this case the parties failed to foresee one contingency. Because determining how to resolve the unanticipated scenario involves analyzing a plea agreement, courts should apply the "contracts plus" framework. And contracts plus analysis establishes as the proper default rule that courts should allocate this risk to the government unless a plea agreement explicitly provides otherwise. Because none of the plea agreements considered in this Comment included a specific waiver by the defendant of the right to seek relief in the event of future Guidelines amendments, as a matter of contract law, all of the defendants should be permitted to move for § 3582(c)(2) sentence reductions.

The key contracts plus insight is that the agreements at issue are *not* arm's length commercial contracts. If they were, the government's position likely would prevail, because forcing the defendant to bear the risk of future favorable changes is more consistent with how the parties would seemingly have allocated the risk ex ante. Courts commonly address a missing term by "reconstructing the hypothetical bargain"—that is, by supplying the term that they believe the parties would themselves have reached had they anticipated the problem in advance and if bargaining costs were low.[235] Given that most plea agreements involve the defendant waiving all rights to appeal except on grounds of ineffective assistance of counsel, it is likely that, ex ante, the defendant would have waived the right to later seek a sentence reduction.

But that result would be incompatible with the "contracts plus" mode of analysis, with its heightened due process concerns. Under the contracts plus framework, how the parties likely would have allocated

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234 Not to mention, the two alternative approaches proposed in the retroactive amendment cases are fatally flawed. The first, mutual mistake, is inapplicable to retroactive Guidelines amendments. The parties were not mistaken about the state of the world; the state of the world simply changed. The second, fundamental assumption, likewise fails. Under that theory, the continued existence of the original Guidelines range is a "fundamental assumption" that functions as a basic—albeit unstated—condition of a defendant's plea-bargained sentence. See *Sanchez*, 562 F3d at 284 n 13 (Roth dissenting); Arthur Linton Corbin, 6 *Corbin on Contracts* § 590 at 240 (Matthew Bender interim ed 2002). But the non-occurrence of the condition—the collapse of the fundamental assumption—requires rescission of the plea bargain. Arthur L. Corbin, *Conditions in the Law of Contract*, 28 Yale L J 739, 745 (1919). This is not possible in the context of § 3582(c)(2), for the USSC's policy statement explicitly states that a sentence reduction under § 3582(c)(2) in no way upsets the plea agreement nor constitutes a resentencing. USSG § 1B1.10(b)(1); *Dillon*, 130 S Ct at 2694.

235 See Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 Chi Kent L Rev 441, 445 (1990). See also *Jinwoong, Inc v Jinwoong, Inc*, 310 F3d 962, 965 (7th Cir 2002); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich L Rev 1815, 1830 (1991).

the risk is irrelevant. Considering the stakes of the decision—potentially years of incarceration—it would very likely violate the Due Process Clause for the judge to adjudicate the matter by hypothesizing about how she thinks the parties would have bargained.[236] Quite simply, the government, as the drafter of the agreement and the party not waiving constitutional rights, is the one better positioned to bear all unallocated risk. There is no need to consider hypothetical bargains or extrinsic evidence, because according to the "contracts plus" framework, ambiguities in plea agreements should be construed in the defendant's favor, especially when the ambiguous term implicates due process concerns.[237] Even if, as argued in the *Dews* dissent, this outcome gives defendants benefits in excess of what they bargained for,[238] such a result is far more consistent with the overall allocation of benefits and burdens in the criminal law than the alternative of giving the defendant exactly what he bargained for and providing the government with an additional benefit. A "tie goes to the defendant" rule is hardly unprecedented in the criminal law.[239] To the contrary, that the administration of the criminal law gives defendants the benefit of the doubt at every turn is the result of deliberate design; surely the Framers preferred giving close calls to individual defendants than to the state.[240]

Finally, there is little merit to the notion advanced in *Sanchez* that the court cannot alter these sentences because they are forever binding—that a deal is a deal, end of story. It is not evident why courts would consider a sentence imposed pursuant to an 11(c)(1)(C) agreement to be any more "binding" than a judge-created sentence.[241] Quite the contrary: all sentences properly imposed by a judge after guilt is established (either by stipulation or by jury verdict) are final

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236 See *Boykin v Alabama*, 395 US 238, 243 (1969) ("We cannot presume a waiver of . . . important federal rights from a silent record."); *McCarthy v United States*, 394 US 459, 466 (1969) ("[I]f a defendant's guilty plea is not [ ] voluntary and knowing, it has been obtained in violation of due process and is therefore void."); note 231. Because the "parties" to a hypothetical plea agreement did not, by definition, bargain over its terms, the defendant cannot be said to have entered into it voluntarily and knowingly.

237 See note 223.

238 See *Dews*, 551 F3d at 218 (Agee dissenting).

239 See *United States v Santos*, 553 US 507, 514 (2008) (plurality) ("Under a long line of our decisions, the tie must go to the defendant."). Examples include the requirement of proof beyond a reasonable doubt, the exclusionary rule, the Double Jeopardy Clause, and the rule of lenity. See *Dillon*, 130 S Ct at 2692 (describing § 3582(c)(2) as "a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines").

240 See Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 Gonzaga L Rev 1, 53 (2010) ("Constitutional criminal procedure was designed to thwart the state at strategic points, sometimes in circumstances where agents of the state most desire evidence and information.").

241 See *United States v Goins*, 355 Fed Appx 1, 7–8 (6th Cir 2009) (White concurring).

and binding on all parties. This is the point of § 3582: it provides specific congressional authority to revise final, binding sentencing determinations.[242] That a sentence is the product of negotiation, and not unilaterally imposed—that it memorializes a "deal"—does not, as a matter of principle, make it any more final or worthy of effectuation. The question facing courts is not *whether* they can construe the agreement, but rather *how* to fill its gaps.

Because the statutory interpretation analysis conducted in Part III firmly established that binding plea agreements can be based on the Guidelines, the circuit split can be resolved in favor of the minority position so long as contractual analysis does not erect an insurmountable barrier. And the "contracts plus" framework demonstrates that allocating an undickered benefit to the government would be inconsistent with the rules of plea-bargain construction. Contract analysis thus weighs in favor of applying retroactive Guidelines amendments to sentences imposed via binding plea agreement.

CONCLUSION

This Comment argues that FRCrP 11(c)(1)(C) and 18 USC § 3582(c)(2) are not mutually exclusive as a matter of law. Rather, it is possible for a sentence to be both imposed pursuant to a Rule 11(c)(1)(C) plea agreement *and* "based on" the Guidelines. A close inspection of the statutory language and the USSC's policy statements exposes the faulty reasoning underlying the per se rule adopted by the majority of courts that sentences imposed pursuant to binding plea agreements cannot be "based on" the Guidelines. Nor can the contract counterargument salvage the majority's bright-line rule once the "contracts plus" framework for construing plea agreements is appropriately engaged.

This resolution to the circuit split is appealing, as the alternative, majority position rests upon a formalistic distinction that bears little resemblance to the realities of the plea-bargaining process. Plea negotiations unfold in the shadow of the Guidelines, which function as a baseline to anchor the negotiations. To argue, as many courts do, that a sentence cannot be "based on" the Guidelines because it was based on a binding plea agreement is immediately questionable in light of the requirement that all sentencing proceedings—including Rule 11(c)(1)(C) proceedings—"begin by correctly calculating the applicable Guidelines range" to serve as "the starting point and the initial benchmark."[243] In most cases—including all Category I and most

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242 See *Dillon*, 130 S Ct at 2690–91.

243 *Gall*, 552 US at 49.

Category II agreements—the plea agreement is based on the Guidelines, and the ensuing sentence is based on a plea agreement that has necessarily integrated the Guidelines at its foundation; to suggest otherwise, as the majority of courts do, is like arguing that when a movie is based on a play that was based on a novel, the movie is in no way based on the book.

It is vital to remember that this conclusion does not necessarily translate into even a single crack offender receiving a sentence reduction. The decision whether to grant the motion remains firmly within the discretion of the district judge, taking into account the facts of the case, the details of the plea agreement, and the § 3553(a) factors.[244]

To make this decision, however, courts first must have the discretion to consider § 3582(c)(2) motions. This Comment demonstrates that they do. Contrary to the holdings of a majority of federal courts, sentences imposed pursuant to binding plea agreements can be, and often are, both "based on" the defendant's Guidelines range and consistent with the Sentencing Commission's applicable policy statement.

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[244] The Commission also instructs courts to take into account public safety considerations and the defendant's post-sentencing conduct. See USSG § 1B1.10, Application Note 1(B).