No.

In the Supreme Court of the United States

ROBIN EDDIE RIVERA-MARTÍNEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether sentences imposed following plea agreements under Fed. R. Crim. P. 11(c)(1)(C) are (i) eligible for modification under 18 U.S.C. § 3582(c), as held by the Fourth and Tenth Circuits, (ii) categorically ineligible for modification, as held by the First, Second, Third, Sixth, and Eighth Circuits, or (iii) eligible for modification on a case-by-case basis, as held by the Fifth and Seventh Circuits.

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OPINIONS BELOW

The opinion of the First Circuit, App., *infra*, 1a-13a, is available at 2010 WL 2293251. The district court's order is unreported. App. *infra*, 14a-16a.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 3582(c)(2) of title 18 of the United States Code provides, in pertinent part:

> The court may not modify a term of imprisonment once it has been imposed except that * * * in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant * * *, the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 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.

Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will * * * agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

STATEMENT

1. In August 1999, a grand jury in the District of Puerto Rico indicted petitioner for conspiring to possess more than five kilograms of cocaine and more than five kilograms of cocaine base with intent to distribute them, in violation of 21 U.S.C. § 841(a)(1) and 846, and conspiracy to engage in money laundering, in violation of 18 U.S.C. § 1956. C.A. App. A9-A15; see also *id.* at A15-A16 (related forfeiture count). Petitioner agreed to plead guilty to the drug charge pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure,[1] which

[1] At the time of petitioner's guilty plea, the provision was denominated as Rule 11(e)(1)(C). The Rule was reorganized without substantive change in 2002. See App., *infra*, 3a n.1

provides that a plea agreement "may specify that an attorney for the government will * * * agree that a specific sentence or sentencing range is the appropriate disposition of the case," and that "such a recommendation or request binds the court once the court accepts the plea agreement."

a. The plea agreement stipulated that "the United States and the defendant agree to the following [Sentencing G]uidelines calculations:" that petitioner "is to be held accountable in determining the applicable guidelines range to over [1.5] * * * kilograms of cocaine base," that "pursuant to U.S.S.G. § 2D1.1 and based on the above stipulated amount of narcotics the base offense level is THIRTY-EIGHT," to be reduced by three levels for acceptance of responsibility "in accordance [with] U.S.S.G. § 3E1.1," and increased two levels "pursuant to U.S.S.G. § 2D1.1(b)(1)" for possession of a firearm. App., *infra*, 20a. The parties thus agreed that "the total adjusted base offense level is THIRTY-SEVEN" and "[t]here shall be no further departures or adjustments to the base offense level." *Ibid.* Petitioner acknowledged that "the Court is not bound by * * * [the plea agreement's] sentencing guidelines calculations" and that the government "reserves the right to carry out its responsibilities under guidelines sentencing," including the right to dispute sentencing factors or facts material to sentencing. *Id.* at 21a. Petitioner and his attorney represented that they had discussed with one another the provisions of the Sentencing Guidelines which "may apply [in petitioner's] case." *Id.* at 38a. Pursuant to Rule 11(c)(1)(C), the parties agreed that

petitioner "shall be sentenced to a term of 240 months." *Id.* at 33a. The parties did not stipulate to the defendant's criminal history category. See App., *infra*, 34a-35a.

At the plea hearing, the district court questioned petitioner in detail to ensure that he understood every step in the Guidelines calculation. *Id.* at 32a-33a. The government noted that petitioner had a pending homicide charge in state court that the government had concluded should not be included in the federal drug case. The government said that, based on the understanding that that charge was not to be included in the federal case, "we agreed to stipulate to the amount of years based on the quantity of drugs." *Id.* at 33a. If the homicide were properly included in the federal case, the government stated, "then [petitioner] should be pleading to a level 43" instead of offense level 37. *Id.* at 34a. After the colloquy with the defendant, the district court accepted the guilty plea. However, it deferred imposing sentence pending preparation of a presentence report ("PSR"). *Id.* at 41a.

The PSR concluded that the offense conduct yielded an adjusted offense level of 37, as the parties had stipulated, and that petitioner fell within criminal history category II. The PSR thus calculated a sentencing range of 235-293 months, C.A. Supp. App. SA10, encompassing the sentence specified in the plea agreement. See also App., *infra*, 46a.

b. At sentencing, the district court noted that petitioner had not received the PSR at least 35 days before sentencing, as required by Federal Rule of Criminal Procedure 32(e)(2), but defense counsel waived petitioner's objection. App., *infra*, 44a. Defense counsel urged the court to accept the plea agreement, emphasizing that a 240-month sentence "falls clearly within the period of imprisonment" called for by the Guidelines. *Ibid.* Defense counsel stated that the court had represented that it would impose the sentence specified in the plea agreement "unless there was something extraordinary in the [presentence] report," and that "there is nothing extraordinary in the report that would prevent Your Honor from following through on the promised sentence." *Id.* at 45a.

The district court concluded that, "[b]ased on a total offense level of 37 and a Criminal History Category of 2, the imprisonment range in this case is from 235 to 293 months." *Id.* at 46a. The district court then accepted the plea agreement, sentenced petitioner to a term of 240 months' imprisonment, and dismissed the money laundering charge. *Id.* at 46a-47a.

2. Effective November 1, 2007, the Sentencing Commission revised the Guidelines applicable to crack cocaine offenses. See U.S. Sentencing Guidelines Manual, app. C, amend. 706, 711 (2009). Recognizing that the 100-to-1 crack-powder sentencing disparity created an "urgent and compelling problem" that "significantly undermine[d]" Congress's purposes in enacting the

Sentencing Reform Act, U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 8-9 (May 2007), the Commission reduced the base offense level for all crack cocaine offenses. See U.S. Sentencing Guidelines Manual, app. C, amend. 706; see generally *Kimbrough* v. *United States*, 552 U.S. 85, 97-100 (2007) (discussing history of crack cocaine Guidelines and Sentencing Commission reports on subject).

In December 2007, the Commission made the reduction in crack offense levels retroactive. See U.S. Sentencing Guidelines Manual, app. C, amend. 713. By taking that step, the Commission enabled prisoners serving a sentence to rely on the amended crack Guidelines to seek sentence reductions under 18 U.S.C. § 3582(c)(2). That provision permits a district court to reduce a sentence "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." 18 U.S.C. § 3582(c)(2); see also U.S. Sentencing Guidelines Manual § 1B1.10(a)(1) (establishing procedure for reduction).

3. In December 2008, petitioner, acting *pro se*, filed a motion for modification of sentence under Section 3582(c)(2). Application of the Guidelines amendments to his sentence would yield a sentencing range of 188-235 months, C.A. App. A76-A83; a sentence at the same point in the applicable range as his 240-month sentence would yield a sentence of 192 months, a reduction of 48 months—*four years*. On April 6, 2009, the district court

rejected the motion without a hearing, concluding that "[s]ince the defendant was sentenced under a binding plea agreement, which contemplated a stipulation on the Guidelines calculations and a term of confinement to be imposed thereto, a further reduction of imprisonment * * * is not considered applicable." App., *infra*, 16a.

4. The court of appeals affirmed.[2] It recognized that the applicability of Section 3582(c)(2) to Rule 11(c)(1)(C) plea agreements "has fomented a circuit split." App., *infra*, 2a. After outlining the three conflicting interpretations of Section 3582(c)(2) that the various circuits have adopted, *id.* at 6a-7a & n.2, the court of appeals concluded that courts lack authority to reduce a sentence imposed following a Rule 11(c)(1)(C) plea agreement "[a]bsent an express statement in the plea agreement making the sentence dependent upon a Guideline calculation," *id.* at 10a. The court acknowledged that there is a "connection between C-type plea agreements and the sentencing Guidelines" in that "[i]t is common

[2] Petitioner, who was then incarcerated in Pennsylvania, received the order issued by the U.S. District Court for the District of Puerto Rico on April 22, 2009, after the time for filing a notice of appeal had run. C.A. App. A87. Acting *pro se*, petitioner filed a notice of appeal two days later. *Id.* at A88. Appointed counsel in Puerto Rico then filed a motion requesting an extension of time in which to file a notice of appeal pursuant to Fed. R. App. P. 4(b)(4), which permits the district court, "before or after the time [to file] has expired," to extend the time to file a notice of appeal for up to 30 days "[u]pon a finding of excusable neglect or good cause." The district court granted the motion, finding "good cause for said extension because of the inherent problems" of communicating with an incarcerated client in a different jurisdiction. *Id.* at A7.

practice that, in determining whether to accept or reject the sentence proposed in a C-type plea agreement, a district court will use the Guidelines as a point of comparison" and the Guidelines may "play[] a role in the parties' negotiation of a particular sentence." *Id.* at 9a-10a. But the court nonetheless concluded that, because a Rule 11(c)(1)(C) plea agreement binds the district court after it has been accepted, the sentence imposed in such cases is "'based on' the plea agreement," not the Sentencing Guidelines, and accordingly falls outside the authority granted under Section 3582(c)(2). *Id.* at 8a. The court asserted that the terms of petitioner's plea agreement "d[id] not expressly provide (or even hint) that the stipulated 240-month sentence depends on the guidelines," and the fact that the agreement included stipulated Guidelines calculations "d[id] not suffice." *Id.* at 10a.

The court also held that "Rule 11(c)(1)(C) itself precludes a district court from * * * altering a sentence lawfully imposed under a C-type plea agreement" because "[o]nce the court accepts such a plea agreement, it is bound by the terms thereof." *Id.* at 11a. Accordingly, "the court cannot vary the agreed-upon sentence unless the terms of the plea agreement explicitly authorize it to do so."[3] *Ibid.*; see also *id.* at 2a.

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[3] The court also rejected petitioner's argument that petitioner was entitled to relief because of a "mutual mistake of fact" between the parties. *Id.* at 12a. Although the court acknowledged that "mutual mistake might afford a valid ground for relief from a plea agreement," the court found "no evidence here of a mutual mistake." *Ibid.*

REASONS FOR GRANTING THE PETITION

The question presented here has squarely divided the circuits and is of tremendous importance. In the wake of the Sentencing Commission's retroactive amendment of the Guidelines for crack-cocaine offenses, district courts are dealing with a significant volume of petitions seeking sentence modifications under Section 3582(c)(2). Many of these petitions arise from sentences imposed following binding plea agreements under Rule 11(c)(1)(C) ("C plea agreements"). But the courts of appeals are—as the decision below and many others have acknowledged—in complete disarray over how to treat such sentences under Section 3582(c). As one court aptly put it, there is a "demolition derby" ongoing among the circuits. *United States* v. *Garcia*, 606 F.3d 209, 214 (5th Cir. 2010) (per curiam).

This Court's review is necessary to avoid the exceptionally harsh disparities that the persistence of this conflict would generate. Review is also necessary because the rule adopted below—that sentences imposed following C plea agreements are categorically ineligible for modification under Section 3582(c)(2)—gets the text and purpose of the statute exactly backward. And this case presents the ideal vehicle to resolve the issue: Petitioner agreed to a Guidelines sentence; the district court examined petitioner's case under the Guidelines and imposed a Guidelines sentence. The sentence imposed here was not merely "based on" the Guidelines, it was (like virtually every C plea agreement) *driven by* them.

I. The Circuits Are In Conflict Regarding The Application Of Section 3582(c)(2) To Sentences Imposed Following Pleas Under Rule 11(c)(1)(C)

As the decision below correctly acknowledged, the application of Section 3582(c)(2) to sentences imposed following C plea agreements has "fomented a circuit split," App., *infra*, 2a, that involves 9 of the 12 regional federal courts of appeals. Some courts of appeals have held that relief under Section 3582(c)(2) is categorically unavailable to defendants who have entered C plea agreements; others have adopted a case-by-case approach and evaluate the degree to which the plea agreement specifically references the Guidelines; and still others have held that Section 3582 is as applicable to a sentence under a C plea agreement as it is to any other sentence. This three-way split is stark, widespread, and shows no sign of abating.

A. Five Circuits Have Held That Section 3582(c)(2) Is Never Applicable To Sentences Entered Following C Plea Agreements

In the decision below, the First Circuit joined the Second, Third, Sixth, and Eighth Circuits in declaring that sentences entered following C plea agreements are never "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); see App., *infra*, 14a; *United States* v. *Green*, 595 F.3d 432, 436 (2d Cir. 2010); *United States* v. *Sanchez*, 562 F.3d 275, 279 (3d Cir. 2009); *United States* v.

Scurlark, 560 F.3d 839, 842 (8th Cir. 2009); *United States* v. *Peveler*, 359 F.3d 369, 378-379 (6th Cir. 2004). Those decisions recognize that C plea agreements are commonly "negotiated against the backdrop of guidelines that [a]re subsequently amended," App., *infra*, 6a-7a, and that "[i]t is common practice" for district courts to "use the guidelines as a point of comparison" in deciding "whether to accept or reject the sentenced proposed in" the agreement, *id.* at 9a. Nevertheless, these courts reason, because the plea agreement (if accepted) binds the sentencing court, the sentence is "based on" the agreement, not the Guidelines. These courts have claimed support for their rule in principles of contract law. See, *e.g.*, *id.* at 11a-12a.

Some of these courts reason that the terms of Rule 11(c)(1)(C) trump courts' statutory authority under Section 3582(c)(2). See *Peveler*, 359 F.3d at 375 n.4 ("Yet, a rule of criminal procedure can limit a court's authority."). Because the rule states that a stipulated sentence in a C plea agreement "binds the court once the court accepts the plea agreement," *id.* at 377, those courts have held, a district court *remains* bound even if the Sentencing Commission later retroactively amends the relevant Guidelines, *id.* at 379 ("The plain language of * * * Rule 11(c)(1)(C) * * * generally precludes the district court from altering the parties' agreed sentence under 18 U.S.C. § 3582([c)(2])"); see also *Sanchez*, 562 F.3d at 282 ("If 'binding' is to have meaning, it cannot be

undone by the discretionary possibility of a different sentence under § 3582(c)(2).").[4]

B. Two Circuits Employ A Case-By-Case Approach

The Fifth and Seventh Circuits do not categorically preclude the application of Section 3582(c)(2) to sentences imposed after C plea agreements. *United States* v. *Garcia*, 606 F.3d 209, 214 (5th Cir. 2010); *United States* v. *Franklin*, 600 F.3d 893 (7th Cir. 2010). Instead, these courts require a case-by-case examination of the plea agreement to determine whether the parties' "intent" was "to tie the sentence to the Guidelines." *United States* v. *Ray*, 598 F.3d 407, 409 (7th Cir. 2010). The Ninth Circuit likewise has written that "the terms of the plea agreement are key to determining whether the defendant's sentence was, in fact, based on a sentencing range that was later reduced by the Sentencing Commission," *United States* v. *Bride*, 581 F.3d 888, 891 (9th Cir. 2009), although it has not yet decided the issue. *Id.* at 891 n.5. At least one of these courts has stated that this inquiry extends beyond the plea agreement to include review of the "nuances" of "the sentencing transcript in each particular case." *Garcia*, 606 F.3d at 214.

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[4] The panel's decision in *Sanchez* drew a strong dissent from Judge Roth, who noted her agreement with the Fourth Circuit's contrary decision in *United States* v. *Dews*, 551 F.3d 204 (4th Cir. 2008), and concluded that the government must "specifically bargain[] for" waivers of a right to seek relief under Section 3582(c)(2) "just like the waiver of a defendant's right of appeal or other possible terms of a plea agreement," 562 F.3d at 283 (Roth, J., dissenting).

This flexible approach clearly departs from other courts' categorical prohibition on Section 3582(c)(2) relief. The Fifth Circuit, for example, acknowledged that "the caselaw" is "rife with inter- and intra-circuit disagreement" but expressly concluded that "wooden rules will not do." *Garcia*, 606 F.3d at 214. Likewise, the Seventh Circuit "ma[d]e clear" that its decisions in *Franklin* and *Ray*—which ultimately determined that the terms of the plea agreements at issue did not demonstrate a sufficient connection to the Guidelines sentence to warrant application of Section 3582(c)(2)—"do not mean that all Rule 11(c)(1)(C) plea agreements foreclose relief under section 3582(c)(2)." *Franklin*, 600 F.3d at 897.

C. Two Circuits Have Held That Section 3582(c)(2) Is Fully Applicable To Sentences Imposed Following C Plea Agreements

The Fourth and Tenth Circuits have held that sentences imposed following C plea agreements are no less eligible for relief under Section 3582(c)(2) than other sentences. In *United States* v. *Cobb*, 584 F.3d 979, 984 (10th Cir. 2009), the court held that "nothing in the language of § 3582(c)(2) or in the language of Rule 11 precludes a defendant who pleads guilty under [a C plea agreement] from later benefitting from a favorable retroactive guideline amendment." The court expressly acknowledged that its holding was in conflict with decisions adopting the opposite *per se* rule. *Ibid.* The court explained, however, that those circuits' pursuit of

contract law interpretation analogies had led them to lose sight of the statutory question presented:

> We are construing a statute, not common law. Importing contract ideas into our assessment of § 3582 would hinder adequate consideration of Defendant's perfectly logical analysis and misdirect our focus from the reasonable interpretation that Congress did not intend to keep negotiated plea agreements (even those specifying a particular sentence within a properly computed Guidelines range) from the reach of § 3582.

Id. at 984-985. Accordingly, the Tenth Circuit reasoned, Section 3582(c)(2) "generally allows for reductions of sentences which are based in any way on a qualifying [sentencing] range." *Id.* at 985. Because the plea agreement stipulated to a particular offense level and set forth a stipulated sentence at the low end of the resulting range (168 months), "*[n]o other connection [to the Guidelines] [wa]s required.*" *Ibid.* (emphasis added).[5]

A panel of the Fourth Circuit has reached the same conclusion. *United States* v. *Dews*, 551 F.3d 204 (4th Cir. 2008), vacated and reh'g *en banc*

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[5] The Tenth Circuit later granted the government's petition for rehearing *en banc*. After full briefing and argument, however, the *en banc* court voted unanimously (including Judge Hartz, who had dissented from the panel opinion) to vacate the order granting *en banc* review and reinstate the panel's opinion. *United States* v. *Cobb*, 603 F.3d 1201, 1201 (2010) ("The original panel opinion remains in effect and the judgment which issued originally on October 26, 2009, is reinstated.").

granted, No. 08-6458 (Feb. 20, 2009), appeal dismissed as moot, No. 08-6458 (4th Cir. May 4, 2009). Although that opinion no longer has full precedential force because the case was mooted after the panel opinion was vacated upon the grant of rehearing *en banc*, we are aware of no decision by any court within that jurisdiction taking a contrary view. Indeed, the Tenth Circuit's decision in *Cobb* relied extensively on *Dews* even after the latter appeal had been dismissed, 584 F.3d at 984-985, as did Judge Roth's dissenting opinion in *Sanchez*, see 562 F.3d at 283. See also *United States* v. *Maddox*, 361 Fed. Appx. 172, 173 n.2 (2d Cir. 2010) (noting that author of *Dews*, sitting with Second Circuit by designation after that case's dismissal, "wishes to acknowledge that this holding is contrary to his opinion in *United States* v. *Dews*.").

The panel opinion in *Dews* perfectly illustrates the terms of the conflict. The question boils down, the court explained, to whether a sentence can be "based on" only one thing for purposes of Section 3582(c)(2)—that is, whether it must be "based *exclusively* on" a sentencing range that is later reduced. The court concluded 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(c)(1)(C)." 551 F.3d at 209. The opinion also recognized that this answer was in conflict with other circuits. *Id.* at 209-210. Nonetheless, it concluded that "[n]othing in [Rule 11(c)(1)(C)] precludes a defendant pleading guilty under that rule from receiving the benefit of a later

favorable retroactive amendment to the guidelines." *Id.* at 209.

* * *

There is a widespread, well-recognized, and intractable three-way split among the circuits regarding the application of Section 3582(c)(2) to sentences imposed following C plea agreements. The issue is recurring and important. This Court's intervention is necessary to resolve this conflict, particularly because—as explained in detail below—the proper interpretation of this statute has never been more important.

II. The Broad Importance Of This Issue Is Undisputed

As the government has repeatedly recognized, the issue raised here is of "exceptional importance." Pet. for Rehearing En Banc at 3, 10, *United States* v. *Dews*, No. 08-6458 (4th Cir. Jan. 13, 2009.) (*Dews* Reh'g Pet.); Pet. for Rehearing En Banc at 15, *United States* v. *Cobb*, No. 08-1213 (10th Cir. Dec. 2, 2009) (*Cobb* Reh'g Pet.) ("this is a matter of considerable importance * * * across the country"). Tens of thousands of prisoners are serving sentences for crack-cocaine offenses and are eligible for reductions under the Sentencing Commission's retroactive reduction.

The widespread conflict among the circuits about the meaning of such an important federal statute is reason enough to exercise the Court's certiorari jurisdiction. See Sup. Ct. R. 10. But that division is especially intolerable for a sentencing scheme whose

central mandate is to eliminate "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1); accord 18 U.S.C. § 3553(a).

Nor is the inconsistent application of Section 3582(c)(2) to C plea agreements the only unjustifiable disparity that results from this conflict. The rule adopted below also results in significantly different terms of imprisonment for equally culpable defendants who pleaded guilty to the same offense and received the same sentences depending on whether they entered a C plea agreement or a plea without stipulations; between defendants convicted at trial and those who pleaded guilty; and between those who, like petitioner, were sentenced during the previous decade and those sentenced more recently.

The issue's significance is not confined to cases implicating the retroactive crack Guideline amendment. The Sentencing Commission continues to have the "unusual" power, *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), to relax the finality of federal sentences for certain offenses, 28 U.S.C. § 994(u), in response to "data coming to its attention," *id.* § 994(o), which it has exercised on at least 25 occasions.[6] And as the government has recognized, the disagreement and confusion about the meaning of Section 3582(c)(2) and Rule 11 have

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[6] See U.S. Sentencing Guidelines Manual § 1B1.10(c) (listing Amendments 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702).

implications for "a far greater class of cases," than simply crack offenses. *Dews* Reh'g Pet. at 11; see also *ibid.* (asserting that panel's "reading * * * could be applied to many sentences" and raised questions "important to * * * Rule [11(c)(1)(C)] plea[s] generally"). What is more, in the wake of *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory, C plea agreements appear to be more common as prosecutors and defendants seek to reduce the uncertainty in sentencing exposure. Barry Boss & Nicole L. Angarella, *Negotiating Federal Plea Agreements Post-Booker*, Crim. Just. Summer 2006 at 22, 25 ("Post-*Booker*, the government, in many instances, is more willing to discuss a [C] plea agreement").

It is therefore unsurprising that the government has twice sought—and been granted—*en banc* rehearing of appeals court decisions that rejected the First Circuit's interpretation. In *Cobb*, the government cited "the many cases raising the issue [as] confirm[ation that] this is a matter of considerable importance * * * across the country." *Cobb* Reh'g Pet. at 15 (citations omitted). Likewise, *en banc* review was sought in *Dews* based on the acknowledged "conflict[] with * * * decisions of all other circuits that have addressed the issue" and a representation, based on the "personal approv[al] of the Solicitor General," that the "questions [are of] of exceptional importance." *Dews* Reh'g Pet. at 3. Although in both instances the cases were mooted before *en banc* review occurred, see *Cobb*, 603 F.3d 1201 (10th Cir. 2010) (vacating rehearing order and reinstating panel opinion); Order, *Dews*, 551 F.3d

204 (4th Cir. 2008), No. 08-6458 (May 4, 2009) (dismissing *Dews* appeal as moot), the government has nowhere retracted its acknowledgement of the issue's importance. And its previous claims that the conflict might dissipate have lost plausibility now that additional courts of appeals have rejected the government's interpretation. See Br. in Opp. at *3, *Sanchez* v. *United States*, No. 09-6659, 2009 WL 4680978, (SGBRIEFS) (Nov. 25, 2009) (*Sanchez* Opp.) (urging denial of certiorari because decision in *Cobb* was "an outlier * * * and subject to a forthcoming petition for rehearing en banc"). More particularly, the *en banc* Tenth Circuit expressly reinstated the panel opinion in *Cobb*, and the Fifth Circuit granted relief to the defendant in *Garcia*—both decisions squarely rejecting the result the government had urged.[7]

The problems raised by the First Circuit rule go beyond ones of uncertainty and disparity, frustrating the Sentencing Reform Act's "overarching" objective, *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007),

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[7] The government considered, but did not seek, *en banc* review of the Fifth Circuit's decision in *Garcia*, presumably because it had not appealed the district court's decision granting a 22-month § 3582(c)(2) reduction and had confined its appellate brief to defending the appropriateness of that reduction against Garcia's claims that the lower court could and should have reduced his sentence more substantially. See U.S. Br. at 6-9, *Garcia*, 606 F.3d 209 (5th Cir. 2010) (No. 08-50458); Gov't Motion for Extension of Time to File Petition for Rehearing, *Garcia*, 606 F.3d 209 (5th Cir. 2010) (No. 08-50458) (noting that Solicitor General was considering whether to seek rehearing en banc); Letter to Fifth Circuit Clerk, *Garcia*, 606 F.3d 209 (5th Cir. 2010) (No. 08-50458) (notifying court of government's decision not to seek rehearing).

to ensure that federal sentences are sufficient, "but not greater than necessary." 18 U.S.C. § 3553(a)(6). The court below has held that district courts are powerless to reduce sentences imposed as part of a regime that the Sentencing Commission and Congress have come to recognize as "disproportionately harsh"; "inconsistent" with the goal of "punishing major drug traffickers more severely than low-level dealers"; and "foster[ing] disrespect for * * * the criminal justice system." *Kimbrough*, 552 U.S. at 94-100. And, but for the ruling below, a district court would be able to afford relief to those who are serving prison terms that are unnecessarily and inequitably long. See *Dillon* v. *United States*, 78 U.S.L.W. 4615, 4615 (U.S. June 17, 2010); see also *Barber* v. *Thomas*, 78 U.S.L.W. 4509, 4518 (U.S. June 7, 2010) (Kennedy, J., dissenting) ("To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying").

III. The First Circuit's Rule Is Plainly Wrong

The court below gave two rationales for its conclusion that sentences imposed after C plea agreements are not eligible for reduction under Section 3582(c)(2): (1) a sentence imposed in connection with a C plea agreement is necessarily "based on the agreement"—and therefore could not be based "on the guidelines" within the meaning of the statute, see App., *infra*, 10a; and (2) allowing individuals like petitioner to seek reductions under Section 3582(c)(2) would violate the parties' contractual obligations under Rule 11(c)(1)(C) by

reading into the plea agreement a term that they did not consider or bargain over, *id*. at 11a-13a. Space does not permit a comprehensive response on the merits, but neither rationale withstands even brief scrutiny.

A. The government has maintained that C plea agreements close the door to reductions under Section 3582(c)(2), on the ground that "*[a]ny* sentence other than that agreed to, and *any* modification to the agreed sentence, is inconsistent with the agreement that is supposed to bind the parties and the court." *Dews* Reh'g Pet. at 13 (emphasis added). A petition seeking relief under Section 3582(c)(2), however, *does not* challenge the sentence imposed. See 28 U.S.C. § 2255. The government has argued—and this Court has agreed—that proceedings under "Section 3582(c)(2) proceedings are not equivalent to original sentencings or resentencings." U.S. Br. 25-26, *Dillon* v. *United States*, 78 U.S.L.W. 4615 (U.S. June 17, 2010) (No. 09-6338). Rather, they are "a vehicle through which *appropriately sentenced* prisoners can urge the court to exercise leniency" at a later point. *Ibid.* (emphasis added) (quoting *United States* v. *Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1997)); *United States* v. *Cooley*, 590 F.3d 293, 297 (5th Cir. 2009) ("§ 3582(c)(2) motions 'do not contest' [sentences] but rather 'bring to the court's attention changes * * * that allow for a sentence reduction.'") (quoting *United States* v. *Woods*, 581 F.3d 531, 536 (7th Cir. 2009) (footnotes omitted)).

Section 3582(c)(2) proceedings appeal to the district court's distinct discretionary authority to alter existing final sentences in limited categories of situations, specified by Congress and the Sentencing Commission, where continued operation of the initial sentence is no longer equitable. *Dillon*, 78 U.S.L.W. at 4617-4618. Thus, even if "the effect of [a] Rule 11(c)(1)(C)" plea is to "eliminate[] the court's *sentencing* discretion," *Sanchez* Opp. at *4 (emphasis added), that does not make it "inconsistent" with relief under Section 3582(c)(2). Indeed, it would violate elementary canons of construction to construe a procedural rule such as Rule 11(c)(1)(C) implicitly to restrict power explicitly granted under a statute. See 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

This understanding is confirmed by the prevailing construction of surrounding statutory provisions. Neighboring subsections, for example, authorize sentence reductions where the Bureau of Prisons determines that "extraordinary and compelling reasons" warrant earlier release, 18 U.S.C. § 3582(c)(1)(A)(i), and permit reduction when a prisoner renders "substantial assistance" to the government after a sentence becomes final, *id.* § 3582(c)(1)(B). Like subsection (c)(2), those provisions operate to shorten agreed-upon sentences at the discretion of the district court based on significant events not foreseen at the time of sentencing. See U.S. Br. 18, 19, 31, *Dillon*, 78 U.S.L.W. 4615 (U.S. June 17, 2010) (No. 09-6338) (emphasizing common origins and similarities of the

"three exceptions" codified in Section 3582(c)). But it is generally understood that pleading guilty pursuant to a C plea agreement does not eliminate the defendant's eligibility for discretionary relief under the provisions neighboring Section 3582(c)(2). See *United States* v. *Goins*, 355 Fed. Appx. 1, 7-8 (6th Cir. 2009) (White, J. concurring), *petition for cert. filed* Apr. 9, 2010 (Nos. 09-10245 & 09-10246).

Nor is there any basis for concluding that such a reduction is barred by the terms of the plea agreement itself. The plea agreement in this case, like many such agreements, speaks only to the *original sentence* to be imposed in this case and is silent about eligibility for post-sentence relief years down the road. See App., *infra*, 17a-24a. Nowhere was petitioner informed that a C plea agreement effected a waiver of eligibility for reductions based on future developments, cf. Fed. R. Crim. P. 11(b)(1)(F) (court must inform defendant that guilty plea "waive[s] * * * trial rights"), nor did any provision of the agreement so provide, see *id.* 11(b)(1)(N) (requiring that court explain "the terms of *any plea-agreement provision* waiving the right to appeal or to collaterally attack the sentence") (emphasis added). Declaring a guilty plea to be an *implicit* waiver of a right *nowhere mentioned* in the agreement would not only be highly anomalous—it would be contrary to unanimous circuit law holding that even "broadly written" waivers of rights to contest sentences by appeal or "collateral proceedings" do *not* foreclose applications for relief under Section 3582(c). See *Cooley*, 590 F.3d at 296-297 & nn.11-12 (collecting cases); see also *Sanchez*,

562 F.3d at 283 (Roth, J., dissenting) (arguing that waivers of a right to seek relief under Section 3582(c)(2) "must be specifically bargained for, just like the waiver of a defendant's right of appeal or other possible terms of a plea agreement"). To say that the First Circuit's rule is needed to preserve the terms of the agreement or that a Section 3582(c)(2) reduction grants defendants a "possibility that they bargained away" in entering "C" pleas, *Dews* Reh'g Pet. at 14 (citation omitted), is to assume the conclusion.

In any event, reading the statute correctly does not automatically entitle any defendant to a reduction, nor would it necessarily render irrelevant the fact there had been a plea agreement (or a C plea agreement, in particular). Rather, it only "entitles" the defendant to have a district court *consider* whether, in light the circumstances identified by Congress and the Commission, a limited sentence reduction would be appropriate. *United States* v. *Gaines*, 1993 U.S. Dist. LEXIS 17431, *3 (N.D. Ill. 1993) ("defendants are entitled to this Court's *consideration* of such potential relief"); cf. U.S. Sentencing Guidelines Manual § 1B1.10 (distinguishing between instances where relief is categorically unavailable and others where it is not generally appropriate).

B. The First Circuit's other premise was that the "plain meaning" of Section 3582(c)(2)'s requirement that the sentence be "based on a sentencing range" excludes ones imposed following a C plea agreement, which necessarily is "based on the agreement" of the

parties. App., *infra*, 10a-11a. That rationale fares worse still.

To begin with, ordinary English usage does not support the First Circuit's unexamined and undefended assumption that to be "based on" a thing means based *exclusively* on it. As this Court has recently explained, in "common talk, the phrase 'based on' *indicates a but-for causal relationship*." *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 63 (2007) (emphasis added); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704 (2004) ("[A] given proximate cause need not be, and frequently is not, the exclusive proximate cause."). "Under this most natural reading," a sentence is excluded by the "based * * * on" language only if the sentence agreed-to and imposed "would have happened anyway." *Safeco*, 551 U.S. at 63-64. That is, the decision below rests on the highly implausible assumption that "substituting the amended Guideline for the Guideline in effect at the time the defendant was sentenced," U.S. Br. 6, *Dillon*, 78 U.S.L.W. 4615 (U.S. June 17, 2010) (No. 09-6338), would have had no effect. It is simply not plausible that the parties would have agreed to the same 240-month sentence even if the current crack Guideline had been in effect in 1999.

That is because, as the First Circuit itself recognized, App., *infra*, 9a, sentences under C plea agreements are commonly (indeed, virtually always) imposed, as here, after measuring the agreed term against the applicable Guidelines range, see generally Fed. R. Crim. P. 11(c)(3)(A) (affirming

court's power to "defer a decision [on C plea agreement] until the court has reviewed the presentence report"); *id.* 11(b)(1)(M) (noting court's "obligation to calculate applicable sentencing guideline range" in "determining a sentence"). In fact, the version of the relevant Guideline in effect at the time petitioner was sentenced, U.S. Sentencing Guideline Manual § 6B1.2(c), p.s. (1998), advised district courts to accept a C plea agreement *only* if the sentence agreed to was "within the applicable guideline range" or "depart[ed] from [it] for justifiable reasons." And more significant still, then-governing First Circuit law *made it reversible error* for a district court to impose a sentence under a C plea agreement that did not satisfy that Guideline. *United States* v. *Carrozza*, 4 F.3d 70, 87 (1st Cir. 1993). The First Circuit specified that "an agreement between the government and a defendant not to apply the guidelines would be ineffective."[8] *Id.* at n.13.

And as numerous other courts have recognized, sentences agreed to in C plea agreements are based on the Guidelines in a second respect. It is not merely that the Guideline ranges supply the background for negotiations. By its terms, Rule

[8] Moreover, an agreed-to sentence is "binding" on the district court only in a special sense: the court may still impose a longer or shorter sentence so long as the party adversely affected is given notice and the opportunity to withdraw from the agreement. See Fed. R. Crim. P. 11(c)(5); *United States* v. *Hyde*, 520 U.S. 670, 676 (1997); *Dews* Reh'g Pet. at 13 ("Had the court decided to impose a lower sentence than the 168 months agreed upon, * * * the government would likewise be free to withdraw from the agreement").

11(c)(1)(C) provides that parties may "agree that *a specific sentence or sentencing range* is the appropriate disposition of the case, [and/or] that *a particular provision of the Sentencing Guidelines*, or policy statement, or sentencing factor *does or does not apply*." Fed. R. Crim. P. 11(c)(1)(C) (emphasis added). Rule 11(c)(1)(C) thus expressly contemplates sentences that rest quite firmly on the Guidelines; indeed, the plea agreement in this case specified a Guidelines offense level and stipulated to a sentence that fell within the Guidelines sentencing range. App., *infra*, 20a, 32a.

This same understanding is reflected in the Sentencing Commission policy statement this Court upheld in *Dillon*. The Commission describes various situations where a reduction would be more or less "appropriate," but it identifies the category of cases where Section 3582(c)(2) reductions are "not authorized" narrowly and precisely: ones in which the retroactively-lowered Guideline range played *no* role. Guideline § 1B1.10(a)(2)(A) provides that a reduction is "not * * * authorized under 18 U.S.C. § 3582(c)(2)" if "(A) None of the amendments * * * is applicable to the defendant," or "(B) [An amendment] does not have the effect of lowering the defendant's applicable guideline range." See, *e.g.*, *United States* v. *Ayala-Pizarro*, 551 F.3d 84, 85 (1st Cir. 2008) (relief unavailable where career offender sentence controlled); *United States* v. *Smartt*, 129 F.3d 539, 542 (10th Cir 1997) (defendants "sentenced to a statutory mandatory minimum" are "ineligible for a reduction of sentence under section 3582(c)(2)").

Neither exclusion even arguably applies to petitioner: it is undisputed that Amendment 713 appears on the list of retroactive amendments and has "the effect of lowering [Rivera Martinez's] applicable guideline range." Notably, the Commission's extensive commentary concerning eligibility and appropriateness of reductions nowhere suggests disadvantaged treatment for sentences imposed in connection with C plea agreements, let alone places them in a narrowly circumscribed category of cases for which relief is "not * * * authorized."

The singularly harsh treatment of those in petitioner's position under the First Circuit's rule is especially puzzling in light of the government's agreement that the statutory "based on a sentencing range" language *does not* preclude § 3582(c)(2) reductions for those whose "original term of imprisonment * * * was less than the term * * * provided by the guideline range applicable * * * at the time of sentencing." U.S. Sentencing Guidelines Manual §1B1.10(b)(2)(B); U.S. Br. 6, *Dillon*, 78 U.S.L.W. 4615 (U.S. June 17, 2010); see also *Dillon*, 78 U.S.L.W. at 4618 (citing this rule with approval).

IV. This Case Offers An Ideal Vehicle For Resolving The Issue

In *Sanchez*, the government opposed certiorari on this issue on the grounds that the Tenth Circuit's contrary decision in *Cobb* had been vacated pending *en banc* rehearing and that the issue had caused no further disagreement among the circuits. The

government also argued that even the reading of "based on" adopted by the *Cobb* panel might not benefit the petitioner, who received "the exact sentence specified in the plea agreement * * * even though the [district] court had determined the applicable Guidelines range to be higher" and had "stat[ed] that it was 'depart[ing] from' the Guidelines range due to the binding Rule 11(c)(1)(C) agreement." *Sanchez* Opp. at *5-*6 (citations omitted); see also *id.* *6 ("The facts of this case * * * make it less than an ideal vehicle for deciding whether a defendant who pleads guilty pursuant to Rule 11(c)(1)(C) is ever eligible for a sentence reduction under Section 3582(c)(2)"). Other petitions that raised this question suffered from similar vehicle defects.[9]

This issue is now pending before the Court in two other petitions. See *Freeman* v. *United States*, No. 09-10245 (filed Apr. 7, 2010); *Goins* v. *United States*, No. 09-10246 (filed Apr. 9, 2010). We respectfully submit that this case presents a better vehicle through which to address whether C plea

[9] See, *e.g.*, *Bride* v. *United States*, 130 S. Ct. 1160 (2010) (mem.) (denying review in case where original sentence was 11 years *below* Guidelines minimum, see 581 F.3d at 891; *Main* v. *United States*, 130 S. Ct. 1106 (2010) (mem.) (denying review where petitioner received 84-month sentence instead of "then-applicable Guidelines range [of] 120 to 150 months' imprisonment," 579 F.3d 200, 203 (2d Cir. 2009)); *Scurlark* v. *United States*, 130 S. Ct. 738 (2009) (mem.) (similar). As with *Sanchez*, those denials predate the Tenth Circuit's reinstatement of the panel's judgment in *Cobb* and occurred before the issue had caused further disagreement among the circuits.

agreements are eligible for sentence reductions under Section 3582(c)(2). As the government notes in its joint brief in opposition, Br. in Opp. at 17-18, *Freeman* v. *United States*, Nos. 09-10245, 09-10246 (filed June 16, 2010), "the facts of th[o]se cases make them poor vehicles for deciding whether a defendant who pleads guilty pursuant to a Rule 11(c)(1)(C) agreement is ever eligible for a sentence reduction under Section 3582(c)(2)." To resolve a firearms charge carrying a lengthy mandatory-minimum sentence that was dismissed as part of the C plea agreement, Goins agreed to a sentence that "exceeded the high end of the Guidelines range applicable at the time Goins was sentenced," before the crack Guideline amendment. *United States* v. *Goins*, 355 Fed. Appx. 1, 3 (6th Cir. 2009). In denying Goins' Section 3582(c)(2) motion, the district court "specifically reiterated the appropriateness of Goins's sentence in light of the amendment to the Guidelines." *Ibid*. Thus, as the government notes, "Goins presumably would not prevail under *Cobb*'s case-specific approach." Br. in Opp. at 18, *Freeman*. Freeman's C plea agreement specified a sentence that "remained inside the Guidelines range for his crime, even after the amendment." *Goins*, 355 Fed. Appx. at 3. Thus, unlike petitioner, it is not clear that Freeman would receive a reduced sentence if he were eligible for relief under Section 3582(c)(2).

No such vehicle issues are present here. Petitioner's sentence fell squarely within the sentencing range calculated in the PSR, and the sentencing range under the amended crack Guideline does not encompass the sentence imposed

under his C plea agreement. The agreement elaborately specified the applicable Guidelines calculation, establishing the base offense level "pursuant to U.S.S.G. § 2D1.1"—the provision whose reduction the Commission made retroactive in 2008—which, after stipulated adjustments, yielded a "total adjusted base offense level" of 37. App., *infra*, 20a. During the plea colloquy, the government attorney explicitly acknowledged that the sentence specified in the C plea agreement was based on the Guidelines, stating, "*we agreed to stipulate to the amount of years based on the quantity of drugs*," *id.* at 33a, and stated that, if a sentencing enhancement had been applicable, "then [petitioner] *should be pleading to a level 43*" instead of offense level 37, *id.* at 34a (emphasis added).[10] Under such circumstances, it cannot seriously be maintained that the sentence imposed under the plea agreement was not "based on" the Guidelines.

For its part, the district court probed petitioner's understanding of every step in the Guidelines calculation, and defense counsel urged the court to accept the agreement, emphasizing that the 240-month sentence provided "falls clearly within the period of imprisonment" called for by the Guidelines.

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[10] Although the opinion below asserts in passing that the parties' plea agreement "d[id] not * * * *even hint*[] that the stipulated 240-month sentence depend[ed] on the guidelines," App., *infra*, 10a (emphasis added), the record squarely reflects that the Guidelines *dictated* the sentencing range from which the stipulated sentence was drawn. It is no coincidence that the calculated offense level outlined in the plea agreement and adopted in the PSR yielded a sentencing range that encompassed the stipulated prison term.

And consistent with what then-governing circuit law required, see *supra* p. 26, the court imposed a sentence explicitly highlighting the congruence between that sentence and "the imprisonment range" that Guideline § 2D1.1 (then) specified for petitioner's criminal history and offense levels. Thus, it is *only* by adopting an unnatural and singularly limiting reading of Rule 11(c)(1)(C)'s "based on" language that the refusal even to consider petitioner's application for a reduced sentence could be sustained.

There is nothing to be gained from allowing this issue to "percolate" further. All facets of the issue have now been thoroughly discussed in decisions by 9 of the 12 regional courts of appeals; the Tenth Circuit has reinstated the panel opinion in *Cobb*; and the Fifth Circuit confirmed the significance of the case-by-case approach in *Garcia*. The costs of letting the decision stand are substantial—in terms of persistent uncertainty, years of unwarranted imprisonment for petitioner and others, and completely avoidable sentence disparities between defendants who pleaded guilty under a C plea agreement and those who proceeded under other types of agreements or who went to trial. See *Barber* v. *Thomas*, 78 U.S.L.W. at 4518 (Kennedy, J., dissenting). Review by this Court is urgently warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 2010

APPENDIX

Appendix A

First Circuit Opinion

United States Court of Appeals
For the First Circuit

No. 09-1766

UNITED STATES OF AMERICA,

Appellee,

v.

Robin Eddie Rivera-Martínez,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF PUERTO RICO

[Hon. Jay A. García-Gregory, U.S. District Judge]

Before

Torruella, Selya and Howard, Circuit Judges.

Jean C. LaRocque, by appointment of the court, for appellant.

Vijay Shanker, Attorney, Appellate Section, Criminal Division, United States Department of Justice, with whom Rosa Emilia Rodríquez-Vélez, United States Attorney, Nelson Pérez-Sosa, Assistant United States Attorney (Appellate Chief), and Julia M. Meconiates, Assistant United States Attorney, were on brief, for appellee.

June 9, 2010

SELYA, Circuit Judge. This appeal raises an issue, new to this court, that has fomented a circuit split: Is a defendant who was sentenced pursuant to a binding C-type plea agreement, Fed.R.Crim.P. 11(c)(1)(C), for conspiring to distribute crack cocaine entitled to a sentence reduction by reason of retroactive amendments to the Sentencing Guidelines designed to lower sentences for crack cocaine offenses? We conclude that, in the absence of explicit countervailing language in the plea agreement, 18 U.S.C. § 3582(c)(2) does not apply and, therefore, such a defendant is ineligible for the sentence reduction.

I. BACKGROUND

On March 6, 2000, defendant-appellant Robin Eddie Rivera-Martínez pleaded guilty to a charge of

conspiring to possess with intent to distribute, inter alia, more than five kilograms of cocaine base (crack cocaine). See 21 U.S.C. §§ 841(a)(1), 846. The defend-ant entered his plea after having made an agreement with the government pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C).[1] That rule allows the parties to agree to a specific disposition, which will bind the district court if, as, and when the court accepts the agreement. A plea of this kind is commonly termed a "C-type" plea, and we will employ that nomenclature.

The defendant's plea agreement spells out the parties' agreement that the defendant will receive a 240-month sentence. Although the pact contains no forecast of a guideline sentencing range (GSR), paragraph seven includes a stipulation to a total offense level (thirty-seven) and a covenant against further adjustments to that level.

At the change-of-plea hearing, the district court provisionally accepted the proffered plea and ordered the preparation of a presentence investigation report

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[1]More precisely, the plea agreement was made pursuant to former Rule 11(e)(1)(C), which was revised and renumbered in 2002. It is now Rule 11(c)(1)(C). The revisions are wholly stylistic. See Fed.R.Crim.P. 11 advisory committee's note (2002 amendments); see also United States v. Main, 579 F.3d 200, 203 n. 2 (2d Cir. 2009); United States v. Scurlark, 560 F.3d 839, 841 n.3 (8th Cir. 2009). For ease in exposition, we use the new number throughout.

(PSI Report). When delivered, the PSI Report suggested a GSR, the calculation of which was premised upon the stipulated total offense level and a criminal history category of II.

The district court convened the disposition hearing on September 12, 2000. After rehearsing the PSI Report's guideline calculations (which yielded a GSR of 235-293 months), the court stated that it would "accept the [C-type] plea agreement stipulated by the parties and . . . sentence the Defendant accordingly." It then imposed the agreed-upon sentence: 240 months in prison.

We fast-forward to 2007, when the United States Sentencing Commission announced an across-the-board reduction of base offense levels for crack cocaine offenses. See USSG App. C, Amend. 706 (Supp. 2007) (modifying USSG § 2D1.1); see also USSG App. C, Amend. 711 (Supp. 2007). These amendments, originally effective November 1, 2007, were later made retroactive. See USSG App. C, Amend. 713 (Supp. 2008). Their purpose was to ameliorate the sentencing disparity between offenses involving powdered cocaine and offenses involving crack cocaine. See United States v. Caraballo, 552 F.3d 6, 8 (1st Cir. 2008).

Seizing upon these developments, the defendant moved for a sentence reduction. See 18 U.S.C. § 3582(c)(2). The district court denied the motion. United States v. Rivera-Martínez, No. 99-255-003 (D.P.R. Apr. 7, 2009) (unpublished order). The court reasoned that because the defendant was "sentenced

under a binding plea agreement, which contemplated a stipulation on the . . . term of confinement to be imposed . . ., a further reduction of imprisonment pursuant to Amendments # 706 and 711 ... is not considered applicable." Id. This timely appeal ensued.

II. ANALYSIS

We normally review a district court's denial of a motion for sentence reduction for abuse of discretion. See, e.g., United States v. Rodríguez-Peña, 470 F.3d 431, 432 (1st Cir. 2006) (per curiam). Here, however, the threshold question is whether the district court had authority to revise the sentence. That is a question of law, which engenders de novo review. Caraballo, 552 F.3d at 9.

For the most part, once a pronounced sentence in a criminal case becomes final and unappealable, the sentencing court may not revise it. 18 U.S.C. § 3582(c). Like virtually every general rule, however, this rule is subject to exceptions. One such exception provides:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission ... the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy

> statements issued by the Sentencing Commission.

Id. § 3582(c)(2). This subsection authorizes a district court to reduce a sentence if-and only if-the Sentencing Commission subsequently amends a guideline on which the sentence was based. Caraballo, 552 F.3d at 9.

In this instance, the defendant pleaded guilty by means of a C-type plea agreement. The applicable rule permits the parties to agree that, upon the entry of a plea of guilty or nolo contendere, the government will "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply." Fed. R. Crim. P. 11(c)(1)(C). Where the parties employ this device (as they did in this case), the resultant "recommendation or request binds the court once the court accepts the plea agreement." Id. This sets up a unique dynamic: although garden-variety plea agreements generally are treated as binding on the defendant and the government, see United States v. Teeter, 257 F.3d 14, 28 (1st Cir. 2001), only C-type plea agreements bind the sentencing court as well. See United States v. Scurlark, 560 F.3d 839, 842 (8th Cir. 2009).

The salient question in this case reduces to whether a district court has authority, under section 3582(c)(2), to modify a sentence imposed pursuant to a C-type plea agreement when that agreement was negotiated against the backdrop of guidelines that

were subsequently amended. Although this question is one of novel impression in this circuit, other courts of appeals have grappled with it. The majority of them have held, albeit with varying rationales, that the district court lacks such authority under section 3582(c)(2). See, e.g., United States v. Green, 595 F.3d 432, 436 (2d Cir. 2010); United States v. Sanchez, 562 F.3d 275, 279 (3d Cir. 2009); Scurlark, 560 F.3d at 842; United States v. Peveler, 359 F.3d 369, 378-79 (6th Cir. 2004). Other courts have strayed from this categorical approach in favor of a case-by-case appraisal aimed at determining whether a particular sentence, when rendered, could fairly be said to have been based on the guidelines. See, e.g., United States v. Garcia, 606 F.3d 209, 214 (5th Cir. 2010) (per curiam); United States v. Franklin, 600 F.3d 893, 896 (7th Cir. 2010). One court of appeals, reading the language of section 3582(c)(2) broadly, has held that a district court has authority to reduce a sentence imposed pursuant to a C-type plea agreement.[2] See United States v. Cobb, 584 F.3d 979, 985 (10th Cir. 2009).

We begin our analysis with the elementary proposition that a court, within wide limits, should

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[2]A panel of the Fourth Circuit held similarly, but the court granted rehearing en banc, simultaneously vacating the panel opinion. See United States v. Dews, 551 F.3d 204 (4th Cir. 2008), reh'g en banc granted, No. 08-6458 (4th Cir. Feb. 20, 2009). The en banc court later dismissed the appeal as moot, and the panel opinion is no longer good law. See United States v. Cook, 594 F.3d 883, 888 n.3 (D.C. Cir. 2010).

interpret a plea agreement according to principles of contract law. United States v. Ortiz-Santiago, 211 F.3d 146, 151 (1st Cir. 2000); cf. Teeter, 257 F.3d at 28 (recognizing certain limits to this analogy). Once a defendant knowingly and voluntarily enters into a plea agreement, both the defendant and the government become bound by its terms. Ortiz-Santiago, 211 F.3d at 151. If the pact is a C-type plea agreement and the district court accepts it, the court too is bound by its terms. See Fed. R. Crim. P. 11(c)(1)(C). While a district court is free to accept or reject a C-type plea agreement, see Fed. R. Crim. P. 11(c)(3)(A), it may not, after acceptance, disregard the terms of such an agreement. See Green, 595 F.3d at 438; Scurlark, 560 F.3d at 842; Peveler, 359 F.3d at 377.

The defendant's claim that the guideline amendments bring him within the compass of section 3582(c)(2) and entitle him to a sentence reduction is undermined by the way in which C-type plea agreements operate. Once the district court accepts a C-type plea agreement, the court is obliged to sentence the defendant in strict conformity with the terms of the agreement. The sentence is, therefore, "based on" the plea agreement. See Green, 595 F.3d at 440-41; Sanchez, 562 F.3d at 282 n.8; Scurlark, 560 F.3d at 842. That is antithetic to the requirements of section 3582(c)(2), under which a district court lacks authority to modify a sentence unless that sentence is "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

This does not mean that there is no connection between C-type plea agreements and the sentencing guidelines. It is common practice that, in determining whether to accept or reject the sentence proposed in a C-type plea agreement, a district court will use the guidelines as a point of comparison. But taking such a precautionary step does not transmogrify an agreement-based sentence into one based on the guidelines.[3] See United States v. Cieslowski, 410 F.3d 353, 364 (7th Cir. 2005) ("A sentence imposed under a [C-type] plea arises directly from the agreement itself, not from the

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[3]To some extent, this conclusion was adumbrated by our earlier decision in Caraballo. There, we wrote that "if an amended guideline does not have the effect of lowering the sentencing range actually used at sentencing, the defendant's sentence was not based on that range within the intendment of [section 3582(c)(2)]." 552 F.3d at 10; see also United States v. Cardosa, 606 F.3d 16, 21 (1st Cir. 2010) (holding that "where the defendant's existing sentence was ultimately determined by the old crack cocaine guidelines . . . resentencing is within the discretion of the district court") (emphasis in original). Even though these statements were not made in cases involving C-type plea agreements, they are in harmony with our holding today. After all, when a defendant enters into a C-type plea agreement, the court does not sentence the defendant according to a guideline calculation but, rather, according to the sentence stipulated in the plea agreement. Thus, there is no "sentencing range actually used at sentencing." Caraballo, 552 F.3d at 10.

Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea.").

The fact that the guidelines may have played a role in the parties' negotiation of a particular sentence does not alter this analysis. When a C-type plea is at issue, it is the terms of the agreement, not the process of arriving at those terms or the external considerations bearing upon them, that dictate the sentence to be imposed. See United States v. Ray, 598 F.3d 407, 409 (7th Cir. 2010); United States v. Bride, 581 F.3d 888, 891 (9th Cir. 2009); see also Ortiz-Santiago, 211 F.3d at 151 (explaining that the court should not look beyond the four corners of a plea agreement in construing its terms). Absent an express statement in the plea agreement making the sentence dependent upon a guideline calculation, a sentence imposed pursuant to a C-type plea agreement is based on the agreement itself, not on the guidelines. See Green, 595 F.3d at 440-41; Sanchez, 562 F.3d at 282 n.8; Scurlark, 560 F.3d at 842.

In the case at hand, the terms of the plea agreement do not expressly provide (or even hint) that the stipulated 240-month sentence depends on the guidelines. The fact that the agreement includes a stipulation as to the defendant's total offense level does not suffice. Merely mentioning one integer in a possible guidelines calculation is not enough to evince a mutual intention that the agreed-upon sentence

will be adjusted should the relevant guidelines change.[4]

We add a coda. Even apart from the plain meaning of "based on" in section 3582(c)(2), Rule 11(c)(1)(C) itself precludes a district court from unilaterally altering a sentence lawfully imposed under a C-type plea agreement. Once the court accepts such a plea agreement, it is bound by the terms thereof. See United States v. Mukai, 26 F.3d 953, 955 (9th Cir. 1994) (noting that "[t]he rules contain no provision for the district court to modify a [C-type] plea agreement"). Consequently, the court cannot vary the agreed-upon sentence unless the terms of the plea agreement explicitly authorize it to do so. See Peveler, 359 F.3d at 378-79. In the absence of such a provision, the court is bound to impose (and leave undisturbed) the agreed-upon sentence. See Sanchez, 562 F.3d at 281 n.7; id. at 282-83 (Rendell, J., concurring); Peveler, 359 F.3d at 378-79.

This result is consistent with the established view that plea agreements are for the most part governed by principles of contract law. In this case, no

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[4]Indeed, the instant plea agreement does not even contain the ingredients from which a GSR could be calculated. It is not only silent as to the defendant's criminal history category but also states explicitly that the parties have not reached a consensus on that subject. Thus, it is impossible, within the four corners of the plea agreement, even to calculate the GSR.

principle of contract law would have justified the lower court, once it accepted the agreement, in revising the specified sentence.

In an effort to contradict this conclusion, the defendant asserts that this is a case that involves a mutual mistake of fact; that is, a mutual mistake about a fundamental assumption-the immutability of the guidelines that formed the backdrop against which the parties negotiated the agreed-upon sentence. The doctrine of mutual mistake is recognized in the law of contracts, see 27 Samuel Williston, Williston on Contracts § 70:74 (4th ed. 2003), but the attempt to weave it into the fabric of this case is an exercise in futility.

Whether a party to a plea agreement may be entitled to relief on the ground of mutual mistake is in dispute. Compare, e.g., United States v. Olesen, 920 F.2d 538, 542 (8th Cir. 1990) (holding that principle of mutual mistake does not apply to permit modification of plea agreement), with, e.g., United States v. Bradley, 381 F.3d 641, 648 (7th Cir. 2004) (holding that mutual mistake as to essential element of plea agreement can invalidate entire agreement). This court has indicated that, in rare instances, mutual mistake might afford a valid ground for relief from a plea agreement. See Teeter, 257 F.3d at 28 n.12 (dictum).

We need not resolve this question definitively because there is no evidence here of a mutual mistake. In other words, there is nothing that suffices to show an assumption, held by both the

defendant and the prosecution, that the relevant guidelines would not be amended in the future. The raw materials needed to apply the doctrine of mutual mistake are, therefore, lacking. See Sanchez, 562 F.3d at 281 n.7; Peveler, 359 F.3d at 378 n.4.

III. CONCLUSION

We need go no further. The plea agreement at issue here reflects the parties' agreement to a specific sentence, and the district court, once it accepted that C-type agreement, was duty bound to adhere to that sentence. It follows inexorably that the imposed sentence is based on the plea agreement itself, not on "a sentencing range that has subsequently been lowered." 18 U.S.C. § 3582(c)(2). The upshot is that, notwithstanding the guideline amendments lowering the offense levels for crack cocaine offenses, section 3582(c)(2) does not authorize a reduction of the defendant's sentence.

Affirmed.

Appendix B

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

UNITED STATES DISTRICT COURT

for the

District of Puerto Rico

United States of America v. ROBIN EDDIE RIVERA-MARTINEZ	Case No: 99-255-003 (JAG) USM No: 18159-069
Date of Previous Judgment: September 12, 2000	Melanie Carrillo, FPD; Luis Chaves-Ghigliotty
(Use Date of Last Amended Judgment if Applicable)	Defendant's Attorney

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of **x** the defendant □ the Director of the Bureau of Prisons □ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline

sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion,

IT IS ORDERED that the motion is:

X DENIED. GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of months **is reduced to** _____ .

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Offense Level:	Amended Offense Level:
_____	_____
Criminal History Category: ___	Criminal History Category: ___
Previous Guideline Range: ____ to____ months	Amended Guideline Range: _____to _____ months

II. SENTENCE RELATIVE TO AMENDED GUIDELINE RANGE

The reduced sentence is within the amended guideline range.

□ The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range.

Other (explain):

III. ADDITIONAL COMMENTS

Since the defendant was sentenced under a binding plea agreement, which contemplated a stipulation on the guideline calculations and a term of confinement to be imposed thereto, a further reduction of imprisonment pursuant to Amendments #706 and 711, set forth in App. C of Nov. 1, 2007 Edition of the U.S. Sentencing Guidelines is not considered applicable.

Except as provided above, all provisions of the judgment dated **Sept. 12, 2000** shall remain in effect.

IT IS SO ORDERED.

Order Date: April 6, 2009	/s/ JAY A. GARCIA-GREGORY Judge's signature
Effective Date: April 6, 2009 (if different from order date)	Jay A. Garcia-Gregory, U.S. District Judge Printed name and title

Appendix C

Plea Agreement

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA. · Plaintiff,	* * * * * *	CRIMINAL NO. 99-255 (HL)
v.	* *	
ROBIN EDDIE RIVERA MARTINEZ Defendant.	* * * *	

PLEA AGREEMENT

TO THE HONORABLE COURT:

COMES NOW the United States of America, by and through its attorneys, Guillerrno Gil, United States Attorney for the District of Puerto Rico, Jorge E. Vega Pacheco, Assistant U.S. Attorney, Chief, Criminal Division, and Sonia I. Torres, Assistant United States Attorney for said District and the defendant, Robin Eddie Rivera Martinez, the defendant's counsel, Luis Chavez Ghigliotty, Esq., pursuant to Rule 11(e)(1)(c) of the Federal Rules of

Criminal Procedure, and state to this Honorable Court, that they have reached an agreement, the terms and conditions of which are as follows:

1. The defendant, Robin Eddie Rivera Martinez, agrees to plead guilty to Count I of the pending indictment. Count One charges the defendant that from on or about 1992 until the return of the indictment he willfully, knowingly, unlawfully, and intentionally conspired with Juan Rivera Rivera, Abdul Mendoza Lebron, Robin Edgardo Rivera Martinez, Andy Garcia, Luis Sanchez Diaz aka "Wicho" and others to commit an offense against the United States, to wit: posses [sic] with intent to distribute in excess of five (5) kilograms of cocaine, and in excess of five (5) kilograms of cocaine base a Schedule II Narcotic Drug Controlled Substances [sic]. All in violation of Title 21 United States Code, Sections 841(a)(1) and 846.

2. The penalty for Count I is a mandatory minimum term of TEN (10) years of imprisonment, and a maximum of LIFE IMPRISONMENT, a fine not to exceed FOUR MILLION dollars ($4,000,000.00) dollars, and a term of supervised release of not less than FIVE (5) years in addition to any term of incarceration. The defendant cannot be placed on probation nor have the imposition or execution of the sentence suspended. Further, the defendant acknowledges that parole has been abolished.

The penalty for Count I in accordance with the amount stipulated by the parties is a minimum term

of FIVE (5) years of imprisonment and a maximum of FORTY (40) years a fine not to exceed TWO MILLION dollars ($2,000,000), and a term of supervised release of at least FOUR (4) years in addition to such term of imprisonment. **[THIS PARAGRAPH HAS BEEN CROSSED OUT AND INITIALED]**

3. Prior to the sentencing hearing the defendant will pay a special monetary assessment of one hundred dollars ($100.00) as required by Title 18, United States Code, Section 3013(a).

4. The defendant is aware that the Court may, pursuant to Section 5E 1.2(i) of the Sentencing Guidelines Manual, order the defendant to pay a fine sufficient to reimburse the government for the costs of any imprisonment, probation or supervised release ordered.

5. The defendant agrees that any fine or restitution imposed by the Court will be due and payable immediately.

6. That under the provisions of Rule 11(e)(1)(c) of the federal rules of Criminal Procedure the Court will accept or reject this agreement, if the Court rejects the agreement the defendant will be allowed the opportunity to withdraw his plea under the provisions of Rule 11(e)(1)(c) of the federal rules of Criminal Procedure the Court will accept or reject this agreement, if the Court rejects the agreement the defendant will be allowed the opportunity to withdraw his plea [sic]. All other quantum [sic] of

punishment which make for a full sentence are left to the Court's discretion. All prior law and case decisions applicable to agreements under Rule 11(e)(1)(c) are applicable to this case. All other adjustments otherwise allowable by 18 U.S.C. §3593 remain available.

7. Subject to the provisions of paragraphs 1 through 7 herein, the United States and the defendant agree to the following guideline calculations:

a. That he is to be held accountable in determining the applicable guidelines range to over one point five (1.5) kilograms of cocaine base.

b. That pursuant to U.S.S.G. § 2D1.1 and based on the above stipulated amount of narcotics the base offense level is THIRTY-EIGHT (38).

c. The base offense level shall be reduced by THREE (3) levels, should the defendant accept responsibility in accordance to U.S.S.G. § 3E1.1 as amended.

d. The base offense level shall increase by TWO (2) levels pursuant to U.S.S.G. § 2D1.1(b)(1). At this time the total adjusted base offense level is THIRTYSEVEN (37). There shall be no further departures or adjustments to the base offense level. Further, the parties agree that the defendant shall be sentenced to a term of TWO HUNDRED AND FORTY (240) months.

e. The parties do not stipulate any assessment as to defendant Robin Eddie Rivera Martinez' criminal history category.

8. Defendant Robin Eddie Rivera Martinez is fully aware that the Court is not bound by this plea agreement, including but not limited to: sentencing guidelines calculations, stipulations, dismissal of the remaining counts, and/or sentence recommendation.

9. Whether any party has breached any provision of this plea agreement, if contested, shall be determined by the Court in an appropriate proceeding at which the defendant's and United States' disclosures and documentary evidence shall be admissible and at which the contested party shall be required to establish a breach of the plea agreement by a preponderance of the evidence.

10. The United States reserves the right to carry out its responsibilities under guidelines sentencing. Specifically, the United States reserves the right: (a) to bring its version of the facts of this case including its file and any investigative files to the attention of the probation office in connection with that office's preparation of a presentence report; (b) to dispute sentencing factors or facts material to sentencing; (c) to seek resolution of such factors or facts in conference with opposing counsel and the probation office.

11. The defendant Robin Eddie Rivera Martinez represents to the Court that he is satisfied

with his attorney, Luis Chavez Ghigliotty, Esq., and indicates that he has rendered effective assistance. Defendant understands that by entering into this agreement, defendant surrenders certain rights as provided in this agreement. Defendant understands that the right of criminal defendants include the following:

a. If the defendant had persisted in a plea of not guilty to the charges, defendant would have the right to continue his speedy jury trial as commenced, with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States and the judge agree.

b. If the jury trial continues as initiated, the jury would be composed of twelve lay persons selected at random. The defendant and defendant's attorney would assist in selecting the jurors by removing prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges. The jury would have to agree, unanimously, before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, that it could not convict the defendant unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt, and that it was to consider each charge separately.

c. If a trial is held by the judge without a jury, the judge would find the facts and,

after hearing all the evidence and considering each count separately, determine whether or not the evidence established the defendant's guilt beyond a reasonable doubt.

d. At a trial, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those witnesses and defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence in defendant's own behalf. If the witnesses for the defendant would not appear voluntarily, defendant could require their attendance through the subpoena power of the Court.

e. At the trial, the defendant could rely on the privilege against self incrimination to decline to testify, and no inference of guilty could be drawn from his refusal to testify. If the defendant desired to do so, the defendant could testify in the his own behalf.

12. The accompanying Statement of Facts signed by the defendant is hereby incorporated into this plea agreement. Defendant adopts the Statement of Facts and agrees that the facts therein are accurate in every respect and, that had the matter proceeded to trial, the United States would have proved those facts beyond a reasonable doubt.

13. This plea agreement binds only the United States Attorney's Office for the District of

Puerto Rico and the defendant; it does not bind any other federal district, state or local authorities.

14. This written agreement constitutes the complete Plea Agreement between the United States, the defendant, and the defendant's counsel. The United States has made no promises or representations except as set forth in writing in this plea agreement and deny [sic] the existence of any other term and conditions not stated herein.

15. No other promises, terms or conditions will be entered unless in writing and signed by all parties. The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty.

RESPECTFULLY SUBMITTED.
GUILLERMO GIL
United States Attorney

/s/ Miguel A. Pereira
Miguel A. Pereira
Assistant U.S. Attorney
Deputy Chief, Criminal Division
Dated: (handwritten: 3/6/00)

/s/ Luis Chavez Chigliotty
Luis Chavez Chigliotty, Esq.
Counsel for Defendant
Dated: (handwritten: 3/6/00)

/s/ Sonia I. Torres
Sonia I. Torres
Assistant U.S. Attorney
Dated: (handwritten: 3/6/00)

/s/ Robin Eddie Rivera Martinez
Robin Eddie Rivera Martinez
Defendant
Dated: (handwritten: 3/6/00)

Appendix D

Plea Hearing Transcript

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	*	CRIMINAL NO. 99-255 (HL)
Plaintiff,	*	
vs.	*	
JUAN RIVERA RIVERA **ROBIN EDDIE RIVERA MARTINEZ,**	* * * * *	San Juan, Puerto Rico March 6, 2000 3:55 p.m.
Defendants.	*	

CHANGE OF PLEA HEARING

BEFORE THE HONORABLE **HECTOR M. LAFFITTE**,
UNITED STATES DISTRICT CHIEF JUDGE

BARBARA DACHMAN, RPR, RMR, CRR
(787) 722-0132
bdachman@realwriterspr.com

APPEARANCES

COUNSEL FOR THE GOVERNMENT

SONIA TORRES PABON, ESQ.
Assistant United States Attorney

COUNSEL FOR DEFENDANT JUAN RIVERA

CARLOS NORIEGA RODRIGUEZ, ESQ.

COUNSEL FOR DEFENDANT ROBIN EDDIE RIVERA

LUIS M. CHAVES GHIGLIOTTY, ESQ.

THE COURT CLERK: Criminal Case 99-255; United States of America v. Defendant No. 1, Juan Rivera Rivera, and Defendant No. 3, Robin Eddie Rivera Martinez, for Change of Plea.

Appearing for defendant Juan Rivera Rivera is Attorney Carlos Noriega, and for defendant Robin Eddie Rivera is Attorney Luis Chaves. For the Government, Assistant United States Attorney Sonia Torres. The defendants are being assisted by the Official Court Interpreter.

MR. CHAVES: Your Honor, Luis Chaves Ghigliotty for defendant Robin Eddie Rivera.

Your Honor, I think that since the posture of this case at this point in time is slightly -- not slightly. Perhaps it's significantly different than Juan Rivera

Rivera's, and we would prefer if your Honor could take the allocutions to the plea separate.

THE COURT: I will do that. I already decided that. Thank you, you read my mind. Very well. Swear the defendants.

(Whereupon, the defendants are duly sworn by the court clerk.)

THE COURT: Let the record show that this change of plea shall be taken jointly except when I address each defendant individually. And whenever I ask them questions, each defendant will state his name before responding.

THE COURT: Now addressing myself to defendant Robin Eddie Rivera Martinez, at page 7 there is a signature over the typewritten words "Robin Eddie Rivera Martinez, Defendant." Is that your signature?

DEFENDANT ROBIN EDDIE RIVERA: That's right.

THE COURT: And, Mr. Chaves, that's your signature?

MR. CHAVES: That is, your Honor.

THE COURT: Now, have you both discussed this plea agreement with your respective counsel?

MR. NORIEGA: On behalf of my client, your Honor, Juan Rivera Rivera, I have.

MR. CHAVES: And on behalf of the defendant Robin Eddie Rivera Martinez, your Honor, I have also discussed this with him.

THE COURT: Now, in paragraph 1 of your plea agreements, you both acknowledge that you agree to plead guilty to Count One of the indictment, charging that from on or about 1992 until the return of the indictment, you willfully, knowingly, unlawfully and intentionally conspired with Luis Sanchez Diaz, Abdul Mendoza Lebron, Robin Edgardo Rivera Martinez, and Andy Garcia Gonzalez to possess with intent to distribute in excess of five kilograms of cocaine and in excess of five kilograms of cocaine base, a Schedule II narcotic drug controlled substance, all in violation of Title 21, U.S. Code, Section 841(a)(1) and 846. Is that so?

THE INTERPRETER: "Yes" as to both.

THE COURT: Now, have you discussed this indictment with your respective counsel?

THE INTERPRETER: "Yes" as to both.

THE COURT: Do you have any doubts as to the nature of the accusation set forth in Count One of the indictment?

THE INTERPRETER: "No" as to both.

THE COURT: Now, the penalty for Count One is a mandatory minimum term of ten years of imprisonment and a maximum of life imprisonment; a fine not to exceed four million dollars; and a term of supervised release of not less than five years, in addition to any term of incarceration.

Also, you may not be placed on probation nor have the imposition or execution of the sentence suspended, because you further acknowledge that parole has been abolished.

Do you so acknowledge?

THE INTERPRETER: "Yes" as to both.

THE COURT: Now, the penalty for Count One, in accordance with the amounts stipulated by the parties, is a term--

MS. TORRES: Your Honor, may I interrupt? That's a typo, because it doesn't apply in this case. The amounts stipulated in this particular case have a statutory minimum of ten years.

THE COURT: Very well. Let the record so reflect. Very well. It's a minimum term of ten years of imprisonment and a maximum of 40 years; a fine not to exceed two million dollars; and a term of supervised release of at least four years, in addition to such term of imprisonment. Is that so?

THE INTERPRETER: "Yes" as to both.

THE COURT: Now, concerning the minimum of five years of supervised release, let me inform you that—what this means.

Once you serve your sentence, your respective sentences, you both will be released on supervised release. Should you violate any of the conditions of supervised release, you will be resentenced and will be doing more time than the time you are going to get through this plea agreement.

Is that clear?

THE INTERPRETER: "Yes" as to both.

THE COURT: Now, because this Court is conducting this Change of Plea Hearing under Rule 11(e)(1)(C) of the Rules of Criminal Procedure, the

Court may accept or reject this plea agreement. If the Court rejects this plea agreement, both of you, or each one of you, if it rejects both of them, will be allowed the opportunity to withdraw your respective plea agreement. However, if the Court accepts this plea agreement, each one of you will be bound by this plea agreement. You may not withdraw your guilty plea once the Court has accepted this plea agreement.

Do you understand that?

THE INTERPRETER: "Yes" as to both.

THE COURT: Addressing myself to defendant Robin Eddie Rivera Martinez, again I say what I told the other defendant, that because this plea agreement is entered under Rule 11(e)(1)(C), the Court may accept or reject the plea agreement. But if the Court rejects the plea agreement, you have the right, you will be entitled to withdraw your guilty plea.

Do you understand that?

DEFENDANT ROBIN EDDIE RIVERA: Yes.

THE COURT: That is, the Court has the discretion to not accept this plea agreement. It is not bound by this plea agreement. However, should the Court accept this plea agreement, then you may not withdraw your guilty plea -- do you understand that?

DEFENDANT ROBIN EDDIE RIVERA: Yes.

THE COURT: -- as a result of the sentence imposed.

Now, in paragraph 7 you agree with the Government that you will be held accountable, for the

purpose of determining the Guideline range, for over 1.5 kilograms of cocaine base.

Is that so?

DEFENDANT JUAN RIVERA: That's right.

DEFENDANT ROBIN EDDIE RIVERA: That's right.

THE COURT: And that based on the above stipulated amount of narcotics, the base offense level is 38. Is that so?

DEFENDANT ROBIN EDDIE RIVERA: That's correct.

THE COURT: And it will be reduced by three levels for acceptance of responsibility.

Is that so?

DEFENDANT ROBIN EDDIE RIVERA: That's right.

THE COURT: But the base offense level shall be increased by two levels under Guideline Section 2D1.1(b)(1).

Is that so?

DEFENDANT ROBIN EDDIE RIVERA: That's right.

THE COURT: And at this time the total adjusted base offense level is 37.

Is that so?

DEFENDANT ROBIN EDDIE RIVERA: That's right.

THE COURT: And there shall be no further departures or adjustments to the base offense level, and further, the parties agree that the defendant shall be sentenced to a term of 240 months.

Do you so agree?

DEFENDANT ROBIN EDDIE RIVERA: That's true.

MR. CHAVES: Your Honor, in that respect I would note that we request -- and we have been discussing this with the Assistant United States Attorney Miss Torres, and it's that with reference to the sentence to be imposed by your Honor, that it be concurrent with those state charges which arise from the same course of conduct and within the context of this conspiracy, to be concurrent with those terms.

MS. TORRES: Your Honor, we don't agree to that at this stage of the proceedings. There is no agreement as to that by the United States.

This defendant has a pending murder case at the state level. It was our understanding that it was borderline as to if it was concerning this drug conspiracy, and based on that we agreed to stipulate to the amount of years based on the quantity of drugs.

If this defendant somehow, what he was essentially stating, can go fight the murder case at trial, make the locals go through all the proceedings and say, "Oh, it doesn't matter, I will still have 20 years," he is not relieving the local authorities of any responsibility in their case. That's how I see it.

MR. CHAVES: Your Honor, in that respect, he proposes to plead guilty on March 31, at the end of this month, before your Honor would sentence him, surely, in this case, and the charge that he's facing in Guayama Superior Court-- or in Guayama Court of First Instance, formerly Superior Court-- is one of the charges which we were given discovery on here, because the Government proposed to prove that homicide in the context of this conspiracy. Thus, Mr. Rivera would be exposed to two sentences basically for the same-- because he's covering it here by this plea.

THE COURT: Is this related, counsel?

MS. TORRES: Well, your Honor, it's not clear to us, because if that was the case, then he should be pleading to a level 43, due to the murder in furtherance of the conspiracy.

THE COURT: Well, why don't you let me handle that at the time of sentencing. Okay.

MR. CHAVES: Your Honor, I simply would like to leave open that we be able to, by the time of sentence, to establish to the satisfaction of your Honor that within the context of this conspiracy and within the context of this plea agreement, your Honor would take that into consideration.

THE COURT: Well, that means that if I decide that it's related, then of course it will be concurrent. If not, it will not be concurrent.

MR. CHAVES: Correct.

THE COURT: That's fair enough, Miss Torres?

MS. TORRES: Yes, your Honor, that's fair enough.

THE COURT: But there is no agreement as to that. It will be left to the Court.

MR. CHAVES: Very well. We simply would move to reserve the right to present those facts to your Honor that would place it within the context of this conspiracy.

THE COURT: Do you agree with that? Referring myself to the defendant.

DEFENDANT ROBIN EDDIE RIVERA: That's right.

THE COURT: Very well. There is no stipulation as to the defendant's Criminal History Category. Is that so?

MR. CHAVES: That's correct, your Honor. I am sorry. Perhaps the defendant should answer that.

THE COURT: Yes, the defendant. There is no stipulation as to your Criminal History Category.

DEFENDANT ROBIN EDDIE RIVERA: No.

THE COURT: Now—"no," you mean that there is no such agreement? In other words, yes, there is no such stipulation. Is that correct?

DEFENDANT ROBIN EDDIE RIVERA: That's right.

THE COURT: Now, you are fully aware that the Court is not bound by this plea agreement, including but not limited to Sentencing Guideline calculations,

stipulations, dismissal of the remaining counts, and/or sentencing recommendations.

Is that so?

DEFENDANT ROBIN EDDIE RIVERA: Yes.

THE COURT: Now, in paragraph 14 of your respective plea agreements, you acknowledge that your written plea agreement constitutes the entire plea agreement between you, your counsel and the Government, and that the Government has made no promises or representations other than those set forth in writing in this plea agreement; and that you both deny the existence of any other term and condition not written into this plea agreement.

Is that correct?

THE INTERPRETER: "Yes" as to both.

THE COURT: And then in paragraph 15 you also acknowledge that no other promises, terms or conditions will be entered unless in writing and signed by all parties.

Is that so?

THE INTERPRETER: "That's correct" as to both.

THE COURT: Then these two paragraphs, 14 and 15, when taken together, mean that these plea agreements may not be modified in any manner unless they-- the agreement or the modification is in writing, or the amendment is in writing and signed by all parties.

In other words, any oral representation that you may say, "Judge, I was promised this by my counsel

or by the prosecutor, by the marshal or by the agent," is no good. It is not valid, unless it is in writing and signed by all parties. As we say in Spanish, "de boquilla no vale."

Do you understand that?

THE INTERPRETER: "Yes" as to both.

THE COURT: Now, at page 8 of your respective plea agreements, I notice that there is a signature at the middle of the page, page 8, "Juan Rivera, Defendant."

Is that your signature, defendant Rivera?

DEFENDANT JUAN RIVERA: Yes.

THE COURT: And at page 8, Robin Eddie Rivera Martinez, is that your signature on page 8?

DEFENDANT ROBIN EDDIE RIVERA: That's correct.

THE COURT: And, Mr. Chaves, that's your signature below, and, Mr. Noriega, that's your signature below.

MR. NORIEGA: Yes, your Honor.

MR. CHAVES: Yes, your Honor.

THE COURT: Now, let me tell you that change of plea hearings are solemn proceedings not to be set aside lightly, as set forth by both the U.S. Supreme Court and the First Circuit Court of Appeals. This means that your answers under oath will be taken as truthful and that you may not then change your heart later.

Now, you have represented to the Court under oath that you have consulted your counsel and that you fully understand all your rights with respect to the indictment pending against each one of you, and that you have both consulted with your respective attorneys and fully understand all your rights concerning the Sentencing Guidelines as they may apply to your case; and that both of you have read this plea agreement and carefully reviewed every part of it with your respective attorneys; and that you both fully understand these agreements and you voluntarily agree to each individual plea agreement.

Is that a truthful statement?

THE INTERPRETER: "Yes" as to both.

THE COURT: Do you wish to make any changes to that statement?

THE INTERPRETER: "No" as to both.

THE COURT: Now, attached to the plea agreements there is a one-page document entitled, "Statement of Facts," and it appears signed by you, by both of you, your individual plea agreements, and your respective counsel.

Is that your signature, defendant Rivera Rivera?

DEFENDANT JUAN RIVERA: Yes.

THE COURT: Is that your signature, defendant Eddie Rivera Martinez, Robin Eddie?

DEFENDANT ROBIN EDDIE RIVERA: That's right.

THE COURT: Miss Torres, will you please give me a brief version of the facts to show at trial that

these two defendants are guilty as charged beyond a reasonable doubt --

MS. TORRES: Yes, your Honor.

THE COURT: -- as to Count One of the pending indictment.

MS. TORRES: The United States would have proven beyond a reasonable doubt that during pertinent times of this conspiracy, defendant Juan Rivera Rivera was the owner of the drug point located at Las Ruinas Ward in Guayama, Puerto Rico; that at said point cocaine and crack cocaine were sold; that in June of 1995 defendant Juan Rivera Rivera, assisted by others, shot and killed Angel Gonzalez Ortiz, as he was a member of a rival drug organization. As to defendant Robin Eddie, the evidence would have shown that during pertinent times of this conspiracy, the defendant sold crack cocaine, cocaine base, at the Ruinas Ward located in Guayama; that the owner, as I said previously, of the drug point was Juan Rivera Rivera.

The United States would have had the testimony of Gustavo Santiago, Jose Colon, and Abdul (phonetic) Mendoza to prove these defendants' participation in the conspiracy charged. In addition, we would have had testimony of various police officers.

THE COURT: Thank you, counsel.

Addressing myself to both defendants: Now that you have listened carefully to the prosecutor's version of the facts to show at trial that you are guilty beyond a reasonable doubt to Count One of the pending

indictment, do you both agree with the prosecutor's version of the facts?

THE INTERPRETER: "Yes" as to both.

THE COURT: Addressing myself to Juan Rivera Rivera, how do you plead to Count One of the indictment?

DEFENDANT JUAN RIVERA: Guilty.

THE COURT: Addressing myself to Robin Eddie Rivera Martinez, how do you plead to Count One of the indictment?

DEFENDANT ROBIN EDDIE RIVERA: Guilty.

THE COURT: The Court finds that your decision, respective decisions to plead guilty as to Count One of the pending indictment have been knowingly, intelligently, voluntarily, and solemnly made, and that you both have had two attorneys with experience and competence, really experienced and competent.

And since you have been explained the maximum possible sentence and you have been explained about your basic fundamental rights in this court, and further, since you have been held competent to plead now, and finally, since you both fully acknowledge the prosecutor's version of the facts to show at trial you are guilty as charged beyond a reasonable doubt, I shall accept your respective guilty pleas and enter a judgment of guilty as to Count One as to defendant Juan Rivera Rivera and as to defendant Robin Eddie Rivera Martinez.

Sentencing is hereby set for Wednesday, June 28, 2000, at 9 a.m. I am going to order a presentence report and I suggest both of you to cooperate fully with the probation officer.

Anything else?

MR. CHAVES: Just one matter, your Honor. I know that it doesn't stipulate in the plea that the Government will dismiss Counts Two and Three. My defendant is named in Counts Two and Three, and I would request that the Government stipulate that at the time of sentencing, upon sentencing, they will move to dismiss Counts Two and Three.

THE COURT: I am not certain whether I asked this question, but I will ask this question to both defendants: Has anyone forced you, coerced you, or intimidated you into pleading guilty?

THE INTERPRETER: "No" as to both.

THE COURT: Has any co-defendant in this case intimidated you, forced you, into pleading guilty?

THE INTERPRETER: "No" as to both.

THE COURT: That's all. Have a good day.

MR. CHAVES: Thank you, your Honor.

(Whereupon, at 4:30 p.m. the hearing concludes.)

Appendix E

Sentencing Hearing

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CASE NO. 99-255
vs.	)	
ROBIN EDDIE RIVERA MARTINEZ,	)	
Defendant.	)	

SENTENCING HEARING

BEFORE THE HONORABLE HECTOR LAFFITTE

HATO REY, PUERTO RICO

TUESDAY, SEPTEMBER 12, 2000, 2:10 P.M.

APPEARANCES:

FOR THE PLAINTIFF:	JARED LOPEZ, ASSISTANT U.S. ATTORNEY
FOR THE DEFENDANT:	LUIS CHAVES-GHIGLIOTTY, ESQ.
COURT REPORTER:	Zulma M. Ruiz, RMR 150 Chardon Avenue 21 Hato Rey, PR 00918 (787) 772-3375

THE COURT: Good afternoon. Please call the case.

THE CLERK: Criminal 99-255, United States of America versus Robin Eddie Rivera Martinez for a sentence.

On behalf of the Government, Assistant U.S. Attorney Jared Lopez.

On behalf of the Defendant, attorney Luis Chaves Ghigliotty.

The Defendant is present and is being assisted by the official court interpreter.

MR. LOPEZ: Jared Lopez on behalf of the United States, Your Honor, ready to proceed.

MR. CHAVES: Luis Chaves Ghigliotty for Defendant

Robin Eddie Rivera. We are ready to proceed, Your Honor.

THE COURT: Counsel, you received this presentence report within the 35-days term or period. I cannot proceed any further unless you waive and your client waives the 35-day prior notice.

MR. CHAVES: I did, Your Honor. I believe we received it on the 17th of August, and we have discussed and I've gone over the presentence report verbatim with the Defendant, and we are ready to waive the 35-day period within the time of being served with the copy and the time of being sentenced.

THE COURT: Addressing myself to the Defendant, do you waive the 35-day prior notice?

THE DEFENDANT: That's correct.

THE COURT: Very well. Counsel, have you examined the presentence report and discussed it with your client?

MR. CHAVES: We have, Your Honor.

THE COURT: Any objections?

MR. CHAVES: We have no objections, Your Honor.

If Your Honor may recall, this is a plea under Rule 11(e)(1)(C) of the Rules of Criminal Procedure, and I believe the recommended range falls clearly within the period of imprisonment which Your Honor approved upon the taking of the plea, and upon that assessment, and also Your Honor has already sentenced the principal defendant in this case, Juan Rivera, consistent also with the

11(e)(1)(C) plea. We believe that Your Honor would be in a position to sentence him – to fulfill Your Honor's representations that you would sentence him unless there was something extraordinary in the report, and I believe there is nothing extraordinary in the report that would prevent Your Honor from following through on the promised sentence.

THE COURT: Any objection to the presentence report from the Government?

MR. LOPEZ: None, Your Honor.

THE COURT: I will hear the Defendant in mitigation of punishment.

THE DEFENDANT: No.

THE COURT: On March 6, 2000, the Defendant, Robin Eddie Rivera Martinez, pled guilty to Count 1 of the Indictment in Criminal Case No. 99-255, charging him with violation of Title 21, U.S. Code, Section 846. That is conspiracy to distribute in excess of five kilograms of cocaine and five kilograms of cocaine base, a class A felony.

Based on Guideline Section 2D1.1 and the amount of cocaine base for which the Defendant is being held accountable, a base offense level of 38 has been determined. As dangerous weapons, that is, firearms, were possessed, a two-level increase is applicable. And because the Defendant has accepted responsibility for his criminal conduct, a three-level decrease is further warranted.

I find no applicable -- no other applicable guideline adjustments.

Based on a total offense level of 37 and a Criminal History Category of 2, the imprisonment range in this case is from 235 to 293 months. The fine range of 20,000 to $4 million, plus a supervised release term of at least five years.

As I said, the Court will accept the 11(e)(1)(C) plea agreement stipulated by the parties and shall sentence the Defendant accordingly.

Therefore, it is the judgment of this Court that the Defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 240 months. Time already served in connection with the instant offense shall be credited.

Upon release from confinement, the Defendant shall be placed on supervised release for a term of five years under the following terms and conditions:

Number 1, the Defendant shall not commit another federal, state or local crime, and shall observe the standard conditions of supervised release recommended by the sentencing commission and adopted by this Court.

Second condition, the Defendant shall not unlawfully possess any controlled substances and shall refrain from possessing firearms, destructive devices, or other dangerous weapons.

Third condition, the Defendant shall refrain from the unlawful use of controlled substances and submit to a drug test within 15 days of release on supervised release, and thereafter, whenever requested by the probation officer.

If any such samples detect substance abuse, Defendant shall participate in a substance abuse treatment program arranged and approved by the probation officer until duly discharged by authorized program personnel with the approval of the U.S. probation officer.

I have considered the Defendant's financial condition and a fine shall not be imposed. However, special monetary assessment in the amount of $100 is imposed as required by law.

Even though you pled guilty, you have the right, you are entitled to appeal the sentence I have just imposed, by filing a notice of appeal with the Clerk of this Court within ten days from the date of the filing of the sentence.

Anything else?

MR. LOPEZ: Not from the Government, Your Honor.

MR. CHAVES: Your Honor, only, this was a plea to Count 1 and the Defendant was named in Count 2 also of the Indictment. We request that the Government dismiss – request dismissal of Count 2 of the Indictment.

MR. LOPEZ: We have no objection.

THE COURT: Granted and so ordered. Anything else?

MR. CHAVES: Nothing else, Your Honor.

THE COURT: Have a good day.

(Whereupon at 2:18 p.m. this hearing was concluded.)