SEP 20 2010

No. 10-113

In the Supreme Court of the United States

ROBIN EDDIE RIVERA-MARTÍNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant who pleaded guilty under a plea agreement in which he agreed to a specific sentence, which became binding on the court under Fed. R. Crim. P. 11(c)(1)(C), may seek a reduction of his sentence under 18 U.S.C. 3582(c)(2) after the retroactive reduction of a Guidelines range, on the theory that his sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 607 F.3d 283. The opinion of the district court (Pet. App. 14a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2010. The petition for a writ of certiorari was filed on July 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Puerto Rico, petitioner was convicted of possessing with intent to distribute cocaine and cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1). Pursuant to a Fed. R. Crim. P. 11(c)(1)(C)

(Rule 11(c)(1)(C)) plea agreement,[1] he was sentenced to 240 months of imprisonment, to be followed by five years of supervised release. Petitioner filed a motion to reduce his sentence pursuant to 18 U.S.C. 3582(c)(2). The district court denied that motion, and the court of appeals affirmed. Pet. App. 1a-13a.

1. On August 19, 1999, a federal grand jury returned an indictment charging petitioner and five co-defendants with conspiring to distribute more than five kilograms each of cocaine and crack cocaine, in violation of 21 U.S.C. 846 (Count 1); conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h) (Count 2); and a related forfeiture count (Count 3). Pet. C.A. App. A9-A17.

2. a. On March 6, 2000, petitioner executed a written plea agreement, in which he agreed to plead guilty to Count 1 in the indictment. Pet. App. 18a. In exchange, the government "agree[d] that the defendant shall be sentenced to a term of TWO HUNDRED AND FORTY (240) months." *Id.* at 20a. The agreement also set forth the offense-level calculations agreed upon by the parties under the Sentencing Guidelines, which resulted in a total adjusted offense level of 37, but noted that the parties were not stipulating to petitioner's criminal history category. *Id.* at 20a-21a.

The agreement provided "[t]hat under the provisions of Rule 11(e)(1)([C]) [now 11(c)(1)(C)] of the federal rules of Criminal Procedure the Court will accept or reject this agreement," and that "if the Court rejects the agreement[,] the defendant will be allowed the opportu-

[1] At the time of petitioner's guilty plea, the provision was Rule 11(e)(1)(C). In 2002, the rule was reorganized without substantive change, and the pertinent provision became Rule 11(c)(1)(C). See Pet. App. 3a n.1. This brief will cite the rule as Rule 11(c)(1)(C).

nity to withdraw his plea under the provisions of Rule 11(e)(1)([C])." Pet. App. 19a. The agreement further provided that "[a]ll prior law and case decisions applicable to agreements under Rule 11(e)(1)([C]) are applicable to this case," *id.* at 20a, and that the agreement was "bind[ing]" on the government and petitioner, *id.* at 23a-24a.

b. The district court accepted petitioner's guilty plea during a change-of-plea hearing on the same day. Pet. App. 40a.

The court explained to petitioner, and petitioner confirmed his understanding, "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 will be entitled to withdraw your guilty plea." Pet. App. 31a. Petitioner also confirmed that he agreed to be sentenced "to a term of 240 months." *Id.* at 33a. Petitioner's counsel requested that the 240-month term of imprisonment be imposed concurrently with whatever sentence petitioner received on pending state murder charges, which, according to counsel, "ar[o]se from the same course of conduct and within the context of this conspiracy." *Ibid.* The government opposed that request, stating that "[i]t was our understanding that it was borderline as to if [the pending state murder case] was concerning this drug conspiracy, and based on that we agreed to stipulate to the amount of years based on the quantity of drugs." *Ibid.* The government added that if the murder charges were related to the conduct in this case, "then he should be pleading to a level 43, due to the murder in furtherance of the conspiracy." *Id.* at 34a. The court stated that it would resolve the question of whether the charges were related at sentencing. *Ibid.* The district

court accepted petitioner's guilty plea to Count 1 of the indictment. *Id.* at 40a.

3. The presentence investigation report (PSR) calculated a base offense level of 38 based on the drug-quantity table, Guidelines § 2D1.1; a two-level enhancement for possession of a dangerous weapon; and a three-level reduction for acceptance of responsibility, which produced a total offense level of 37. PSR ¶¶ 20-21, 25-26. The PSR assigned petitioner a category II criminal history, *id.* ¶ 32, which yielded a Guidelines range of 235 to 293 months of imprisonment, *id.* ¶ 35.

On September 12, 2000, pursuant to the Rule 11(c)(1)(C) plea agreement, the district court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Pet. App. 42a-47a. When asked if the defense had any objections to the PSR, petitioner's counsel stated, "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." *Id.* at 44a. The court responded that "[a]s I said, the Court will accept the 11(e)(1)(C) plea agreement stipulated by the parties and shall sentence the Defendant accordingly." *Id.* at 46a.[2]

4. Section 3582(c)(2) of Title 18 provides that a district 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 subse-

[2] At sentencing, neither the parties nor the district court revisited the matter of petitioner's pending state murder charges.

> quently 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.

18 U.S.C. 3582(c)(2). In Amendment 706, the Sentencing Commission lowered by two levels the base offense level corresponding to each threshold quantity of crack cocaine listed in the drug quantity table in Guidelines § 2D1.1. Sentencing Guidelines App. C, Amend. 706 (effective Nov. 1, 2007). The Sentencing Commission then added Amendment 706 to the list of amendments in Guidelines § 1B1.10(c) that may be applied retroactively. *Id.*, Amend. 713 (effective Mar. 3, 2008).

On December 10, 2008, petitioner filed a *pro se* motion for a modification of his sentence pursuant to Section 3582(c)(2). Petitioner contended that Section 3582(c)(2) and Guidelines § 1B1.10(c) authorized a reduction of his sentence because his sentence had been "based on" a Guidelines range subsequently amended by Amendment 706. Pet. C.A. App. A77.

The district court denied petitioner's request for a sentence reduction under 18 U.S.C. 3582(c)(2). Pet. App. 14a-16a. The court concluded that, "[s]ince 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 * * * is not considered applicable." *Id.* at 16a.

5. Petitioner appealed the denial of his request for a sentence reduction. The court of appeals affirmed. Pet. App. 1a-13a.

Citing the "elementary proposition" that a plea agreement ordinarily should be interpreted in accordance with contract principles, the court of appeals stated that a Rule 11(c)(1)(C) agreement binds not only the defendant and the government, but also the district court. Pet. App. 7a-8a. "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." *Id.* at 8a. "[T]herefore," the court concluded, "[t]he sentence is * * * 'based on' the plea agreement," not "'on a sentencing range that has subsequently been lowered by the Sentencing Commission.'" *Ibid.* (quoting 18 U.S.C. 3582(c)(2)).

The court recognized that, in determining whether to accept or reject a Rule 11(c)(1)(C) agreement, the district court often reviews otherwise applicable guidelines calculations. Pet. App. 9a. "But taking such a precautionary step," the court explained, "does not transmogrify an agreement-based sentence into one based on the guidelines." *Ibid.* Nor does "[t]he fact that the guidelines may have played a role in the parties' negotiation of a particular sentence" have that effect. *Id.* at 10a. The court reasoned that it is the terms of the agreement, not the process of arriving at them, "that dictate the sentence to be imposed." *Ibid.* The court held that "[a]bsent 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." *Ibid.*

Applying those principles to this case, the court determined that the terms of petitioner's plea agreement "do not expressly provide (or even hint) that the stipulated 240-month sentence depends on the guidelines."

Pet. App. 10a. The plea agreement's stipulation as to petitioner's offense level was not sufficient because "[m]erely 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." *Id.* at 10a-11a. The court noted that the plea agreement "does not even contain the ingredients" from which a Guidelines range could be calculated because it explicitly states that the parties did not reach a consensus on petitioner's criminal history category. *Id.* at 11a n.4.

The court further concluded that, even setting aside the "based on" language of 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," because "[o]nce the court accepts such a plea agreement, it is bound by the terms thereof." Pet. App. 11a. That result, the court concluded, is consistent with contract law principles. *Id.* at 11a-12a.

ARGUMENT

Petitioner contends (Pet. 9-32) that the court of appeals erred in holding that 18 U.S.C. 3582(c)(2) does not permit the district court to reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement, and that its decision deepens an existing conflict among the courts of appeals on that question. The decision below is correct. Although the court's decision is in tension with *United States* v. *Cobb*, 584 F.3d 979 (10th Cir. 2009), reh'g en banc vacated and judgment reinstated, 603 F.3d 1201 (10th Cir. May 5, 2010), *Cobb* is an outlier. Moreover, the vast majority of Section 3582(c)(2) motions arising from the retroactive application of the 2007 amendment to the crack-cocaine Guidelines have been

adjudicated already, and the pool of affected Rule 11(c)(1)(C) defendants is finite and diminishing. Further review is not warranted.[3]

1. The court of appeals correctly determined that 18 U.S.C. 3582(c)(2) does not apply when a defendant has been sentenced pursuant to a plea agreement under Fed. R. Crim. P. 11(c)(1)(C). Section 3582(c) sets forth the basic rule that a district "court may not modify a term of imprisonment once it has been imposed" and then specifies limited exceptions, including "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).

Under Rule 11(c)(1)(C), a defendant and the government may agree in a plea agreement "that a specific sentence or sentencing range is the appropriate disposition of the case" and that "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Rule 11(c)(4) provides that, "[i]f the court accepts the plea agreement * * * the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4). The district court thus has no authority to modify the sentencing agreement of the parties once it accepts the plea agreement. See Fed. R. Crim. P. 11(c)(1)(C), (3)(A) and (4); see, *e.g.*, *United States* v. *Pacheco-Navarette*, 432 F.3d 967, 971 (9th Cir. 2005) ("[T]he district court is not permitted to deviate from * * * sentences stipulated in [Rule 11(c)(1)(C)] agreements."), cert. denied, 549 U.S. 892 (2006).

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[3] The petitions for a writ of certiorari pending before the Court in *Freeman* v. *United States*, No. 09-10245 and *Goins* v. *United States*, No. 09-10246 present the same question as the petition in this case.

Accordingly, in the Rule 11(c)(1)(C) context, the district court imposes a sentence "based on" the agreement of the parties, regardless of whether that sentence correlates with the Sentencing Guidelines range. Although the court generally considers the applicable Guidelines range in determining whether to accept the plea agreement, see Guidelines § 6B1.2(c), that does not mean that the defendant is sentenced "based on" the Guidelines range. See, *e.g.*, *United States* v. *Cieslowski*, 410 F.3d 353, 364 (7th Cir. 2005) ("A sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea."), cert. denied, 546 U.S. 1097 (2006). The court may choose to accept a sentence or range specified by the parties' agreement and thereby become bound under the terms of the agreement and Rule 11(c)(1)(C), even if the sentence or range diverges from the Guidelines range. The parties' agreement to that sentence or range, once accepted, becomes the controlling basis for the court's sentencing decision.

Relatedly, the exercise of discretion under Section 3582(c)(2) would be inconsistent with the effect of Rule 11(c)(1)(C), which eliminates the court's sentencing discretion (except to the extent expressly conferred by the parties) once it accepts a plea agreement. The government will often give up the right to seek a higher sentence in exchange for the certainty of obtaining a specific sentence. See, *e.g.*, *United States* v. *Scurlark*, 560 F.3d 839, 842 (8th Cir.) (noting that "[e]ach party offered concessions to reach the [Rule 11(c)(1)(C)] agreement" and noting the benefits received by the defendant under the agreement), cert. denied, 130 S. Ct. 738 (2009); *United States* v. *Goins*, 355 Fed. Appx. 1, 3 (6th

Cir. 2009) (noting "carefully constructed agreement in which the parties balanced many factors—including the charges to which [the defendant] would plead guilty, the charges which the Government would move to dismiss, and the amount of drugs for which [the defendant] would be held responsible"), petitions for cert. pending, No. 09-10245 (filed Apr. 7, 2010) and No. 09-10246 (filed Apr. 9, 2010). The contractual bargain, which becomes binding on the court after acceptance of the Rule 11(c)(1)(C) agreement, would be negated if Section 3582(c) were interpreted to grant the court discretion to lower the agreed-upon sentence in light of developments not reflected in the parties' agreement. See *ibid.* (finding that "the parties acted under Rule 11(c)(1)(C) in order to restrict the ability of the court to upset the negotiated balance" reflected in their agreement).

The court of appeals therefore was correct to determine that the condition precedent to a Section 3582(c)(2) adjustment—that the sentence be "based on" a Guidelines range (18 U.S.C. 3582(c)(2))—was not satisfied in this case, where the sentence was imposed pursuant to a Rule 11(c)(1)(C) plea agreement. Petitioner plainly benefitted from his plea agreement because he received the certainty of a 240-month sentence, thereby avoiding a potentially longer sentence had the court sentenced him after calculating and considering the appropriate Guidelines range. The government indicated during the change-of-plea hearing that whether the conduct underlying petitioner's state murder charge was related to the conspiracy in this case was a "borderline" question, and defense counsel stated, at least initially, that it was related. Pet. App. 33a. If the conduct were related, it presumably would have resulted in a higher base offense level (43) and a higher total adjusted offense level (42)

than those calculated in the plea agreement, and ultimately could have resulted in a Guidelines range of 360 months to life imprisonment. See Guidelines §§ 1B1.3, 2A1.1; see also Pet. App. 34a (government counsel stating that if conduct was related, petitioner "should be pleading to a level 43, due to the murder in furtherance of the conspiracy"). The government nevertheless elected not to press the relevant-conduct issue in exchange for petitioner's guilty plea and agreement to a 240-month sentence. See *id.* at 33a (government advising district court that because the relevance of the murder to the federal conspiracy was "borderline," government "agreed to stipulate to the amount of years based on the quantity of drugs"). The government also dismissed Counts 2 and 3 of the indictment as part of the guilty-plea disposition, which potentially saved petitioner from an additional felony conviction, longer term of imprisonment, and related forfeiture for money-laundering conspiracy. Pet. C.A. App. A60. The court of appeals' decision in this case properly preserves the terms of the parties' bargain.[4]

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[4] Petitioner argues that neither Rule 11(c)(1)(C), nor plea agreements entered pursuant to that rule, "restrict power explicitly granted under a statute [18 U.S.C. 3582(c)(2)]." Pet. 22; see Pet. 22-24. But that argument is not responsive to the government's principal contention. The government does not contend that Rule 11(c)(1)(C) trumps Section 3582(c)(2). Rather, the government relies on the binding nature of the sentence in a Rule 11(c)(1)(C) plea agreement (once accepted) to argue that Section 3582(c)(2)'s requirement that the term of imprisonment be "based on" a relevant Guidelines range is not satisfied—*i.e.*, that the sentence imposed by the district court in such a case is not "based on" the Guidelines but rather is required to follow from the plea agreement itself. See pp. 8-11, *supra*. Accordingly, the government relies on the binding nature of Rule 11(c)(1)(C) at the time of the original sentencing to apply, not to trump, Section 3582(c).

2. a. With one exception (discussed below), every court of appeals to have considered the issue has agreed, at least under petitioner's circumstances, that Section 3582(c)(2) does not permit a district court to reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement. See Pet. App. 13a; *United States* v. *Franklin*, 600 F.3d 893, 896 (7th Cir. 2010); *United States* v. *Main*, 579 F.3d 200, 203-204 (2d Cir. 2009), cert. denied, 130 S. Ct. 1106 (2010); *United States* v. *Sanchez*, 562 F.3d 275, 279-282 (3d Cir. 2009), cert. denied, 130 S. Ct. 1053 (2010); *Scurlark*, 560 F.3d at 841-842 (8th Cir.); *United States* v. *Peveler*, 359 F.3d 369, 378-379 (6th Cir.), cert. denied, 542 U.S. 911 (2004); cf. *United States* v. *Bride*, 581 F.3d 888, 890-891 (9th Cir. 2009) (defendant ineligible for Section 3582(c)(2) relief where Rule 11(c)(1)(C) plea agreement provided for sentence below Guidelines range as calculated by district court); see also *United States* v. *Berry*, No. 09-3084, 2010 WL 3447624, at *3 (D.C. Cir. Sept. 3, 2010) (reserving question "when, if ever, a defendant who enters a Rule 11(c)(1)(C) plea agreement is sentenced 'based on a sentencing range'"); *id.* at *6 (concluding that defendant was not sentenced "based on" a Guidelines range "where the district court has calculated a guideline sentencing range and then departed from it and imposed a sentence based on the term of imprisonment set forth in the plea agreement") (Rogers, J., concurring in judgment); *United States* v. *Heard*, 359 F.3d 544, 548 (D.C. Cir. 2004) ("A sentence arising from a Rule 11(e)(1)(C) plea, however, does not result from the determination of an appropriate guidelines offense level, but rather from the agreement of the parties: an agreement that is 'binding

on the court once it is accepted by the court.'" (citation omitted)).[5]

b. The Tenth Circuit is the exception. In *Cobb*, a divided panel held that "the district court has authority to reduce sentences imposed pursuant to Rule 11 pleas where, as here, the sentence was based at least in part on the then-applicable sentencing range." 584 F.3d at 985. The stipulated sentence in *Cobb*, as the plea agreement explicitly indicated, corresponded to the bottom of the originally applicable Guidelines range. *Id.* at 981. The panel majority attempted to distinguish its contrary decision in *United States* v. *Trujeque*, 100 F.3d 869, 870-871 (10th Cir. 1996), on the ground that *Trujeque* "involved a stipulation to a sentence outside the later-lowered sentencing range." *Cobb*, 584 F.3d at 983. But, as the dissent noted, the opinion in *Trujeque* "did not rely on that feature of the case." *Id.* at 988 (Hartz, J., dissenting). The Tenth Circuit subsequently granted the government's petition for rehearing en banc in *Cobb*, but, after oral argument was held, vacated that order and reinstated the panel's judgment. 603 F.3d 1201.[6] Given that *Cobb* is an outlier, and that the en banc Tenth

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[5] Petitioner's reliance (Pet. 14-16) on *United States* v. *Dews*, 551 F.3d 204 (4th Cir. 2008), vacated on reh'g en banc, No. 08-6458 (4th Cir. Feb. 20, 2009), dismissed as moot (4th Cir. May 4, 2009), is misplaced. The grant of rehearing en banc in *Dews* vacated the panel's decision, and the Fourth Circuit subsequently dismissed *Dews* as moot. It thus cannot serve as a source of conflicting authority.

[6] Contrary to petitioner's statement (Pet. 14 n.5), Judge Hartz dissented from the court's vacatur of the order granting rehearing en banc. *Cobb*, 603 F.3d 1201.

Circuit has not yet reached the merits of the issue, this Court's review is not warranted.[7]

In any event, the facts of this case make it a poor vehicle 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). As in *Grayson* (note 6, *supra*), the district court was bound to impose a specific sentence (240 months of imprisonment), and the district court acknowledged as much at sentencing. See Pet. App. 46a ("As I said, the Court will accept the 11(e)(1)(C) plea agreement stipulated by the parties and shall sentence the Defendant accordingly."). And, as the court of appeals found, petitioner's plea agreement "do[es] not expressly provide (or even hint) that the stipulated 240-

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[7] A subsequent panel of the Tenth Circuit recently distinguished *Cobb* based on its facts and followed the Tenth Circuit's earlier decision in *Trujeque* in affirming the district court's denial of a defendant's Section 3582(c)(2) motion. See *United States* v. *Grayson*, No. 10-8010, 2010 WL 2826921 (July 20, 2010) (unpublished). The Rule 11(c)(1)(C) plea agreement in *Grayson* "called for [a sentence of] 180 months imprisonment," and the district court sentenced the defendant to that term. *Id.* at *1. The court of appeals determined that the district court had "specifically acknowledged [that] the term of imprisonment was *not* framed by the guidelines" when it stated that it "accepted the plea agreement without conditions" and that it had "bound [it]self to the terms of this binding plea agreement." *Id.* at *2. The court of appeals reasoned that "this case is more like *Trujeque* because the court was bound to impose the 180-month sentence stipulated to in the plea agreement; it was not merely constrained to impose a sentence within the appropriate guideline range as in *Cobb*." *Ibid.* Accordingly, the Tenth Circuit in *Grayson* concluded that "[t]he requirement of 18 U.S.C. § 3582(c)(2)—that the sentence sought to be reduced was originally 'based on' a subsequently lowered guideline range—was not satisfied." *Ibid.*

month sentence depends on the guidelines." *Id.* at 10a. "Indeed," the court continued,

> the instant plea agreement does not even contain the ingredients from which a GSR [guidelines sentencing range] 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.

Id. at 11a n.4. Although petitioner's agreed-upon sentence of 240 months ultimately fell within the Guidelines range calculated by the court at sentencing (235-293 months), the agreement itself did not contain a basis for calculating petitioner's Guidelines range, let alone explicitly tie the agreed-upon sentence to that range. It is not clear, therefore, that petitioner would prevail even under *Cobb*'s case-specific approach.

c. The Fifth and Seventh Circuits have indicated that, under certain limited circumstances, a defendant who pleaded guilty pursuant to a Rule 11(c)(1)(C) agreement may be entitled to a Section 3582(c)(2) sentence reduction, but those circumstances are not present in this case.

In *Franklin*, *supra*, and *United States* v. *Ray*, 598 F.3d 407, 409-411 (2010), the Seventh Circuit held that the defendant was not entitled to a Section 3582(c)(2) sentence reduction because he had entered into a Rule 11(c)(1)(C) plea agreement for a specific sentence. In each case, the Seventh Circuit—relying, *inter alia*, on the fact that the plea agreement did not explicitly tie the specified sentence to the Guidelines or explain how the parties arrived at the figure—reasoned that the plea

agreement did not reflect an intent by the parties to tie the sentence to the Guidelines. See *Franklin*, 600 F.3d at 896; *Ray*, 598 F.3d at 409. The Seventh Circuit suggested, however, that if, for example, the plea agreement explicitly provided that the term of imprisonment was to be a certain percentage below or at the bottom of the applicable Guidelines range, that might yield a different outcome. See *Franklin*, 600 F.3d at 897; *Ray*, 598 F.3d at 410. The decisions in *Franklin* and *Ray* are consistent with the decision below. The Rule 11(c)(1)(C) agreements for petitioner specified the sentence to which the parties had agreed without explicitly tying that sentence to the Guidelines or explaining how they arrived at the specific figure. Petitioner's Rule 11(c)(1)(C) sentence, therefore, was not "based on" the Guidelines. Because petitioner's agreement did not make the agreed-upon sentence contingent on a Guidelines calculation, the decision below does not implicate the hypothetical circumstances set forth in the Seventh Circuit cases.

In *United States* v. *Garcia*, 606 F.3d 209 (2010), the Fifth Circuit held that the district court had authority to grant a limited sentence reduction under Section 3582(c)(2) to a defendant who had pleaded guilty under Rule 11(c)(1)(C). *Id.* at 212-214. The plea agreement in that case provided for a minimum sentence of 240 months of imprisonment and called on the district court to take into account the Guidelines when imposing the ultimate sentence. *Id.* at 210-211. The district court sentenced the defendant to 262 months of imprisonment—the top of the calculated Guidelines range—and subsequently reduced his sentence based on Amendment 706, but only to 240 months, which was above the amended range (168-210 months). *Id.* at 211. The Fifth

Circuit held that the court had authority to reduce the defendant's sentence because, despite specifying a minimum term of imprisonment, the agreement permitted the district court to select a greater term pursuant to the Guidelines. *Id.* at 214. The court rejected the defendant's claim that he was entitled to a reduction below the minimum term specified in the agreement, because that minimum term was "unmoored from any guidelines calculation" and because "[w]hen the sentencing guidelines for crack offenses changed, bringing down the high end of [defendant]'s range, his negotiated minimum stayed put." *Id.* at 215.

The type of agreement at issue in *Garcia*—which established a floor above which the district court could sentence the defendant depending on the court's Guidelines calculations—is not present in the instant case. Petitioner agreed to a fixed sentence by pleading guilty under Rule 11(c)(1)(C). The decision below thus does not conflict with *Garcia*. Further review is not warranted.

3. This Court's review is also unnecessary because the vast majority of Section 3582(c)(2) motions arising from the retroactive application of the 2007 amendment to the crack cocaine Guidelines have been adjudicated, and the pool of affected Rule 11(c)(1)(C) defendants is finite and diminishing. The Sentencing Commission estimated that 19,500 defendants would be affected by making Amendment 706 retroactive. See Memorandum from Glenn Schmitt et al., United States Sentencing Commission 4-5 (Oct. 3, 2007), http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf. It appears that approximately 17,700 of those defendants have had their Section 3582(c)(2) motions adjudicated already, with 15,848 sentence reductions granted as of July 2010.

See United States Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report*, Tbls. 2 and 5 (July 2010), http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_July.pdf (July 2010 Report).[8] Although the Sentencing Commission's statistics do not indicate how many of the remaining defendants were sentenced pursuant to binding Rule 11(c)(1)(C) agreements, that number presumably decreases by the day (as a function of ongoing adjudications as well as mootness issues).

In light of the diminishing pool of Rule 11(c)(1)(C) defendants affected by Amendment 706, petitioner overstates (Pet. 16-20) the prospective importance of the question presented.[9] This Court has repeatedly denied petitions for certiorari raising the same question as presented in this petition. See *Tucker* v. *United States*, 130 S. Ct. 1880 (2010); *May* v. *United States*, 130 S. Ct. 1880 (2010); *Eggleston* v. *United States*, 130 S. Ct. 1507 (2010); *Clayborn* v. *United States*, 130 S. Ct. 1015 (2009); *Scurlark* (p. 11, *supra*); *Sanchez* (p. 13, *supra*). Although those denials predate the Tenth Circuit's vacatur

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[8] Table 2 of the July 2010 Report indicates that district courts have decided a total of 24,209 Section 3582(c)(2) motions arising from retroactive application of Amendment 706. Of the 8361 denials, only 1867 were filed by defendants previously identified by the Commission as eligible to seek a sentence reduction. See July 2010 Report, Tbl. 5 n.1. Combining the 15,848 grants with the 1867 denials suggests that 17,715 of the 19,500 defendants identified by the Commission have had their Section 3582(c)(2) motions adjudicated.

[9] Petitioner also notes (Pet. 17-18) that the issue in this case could arise in future cases involving the retroactive application of other Guidelines amendments. But speculation that the Commission might exercise its authority to reduce a Guidelines range retroactively for other crimes, in a way that would materially affect a significant number of defendants, does not justify the Court's review at this juncture.

of its grant of rehearing and reinstatement of the panel's judgment in *Cobb*, the passage of time, in addition to the other foregoing reasons, makes denial of further review appropriate here as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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