Are Sentences Fixed by a Plea Agreement "Based on" a Guideline Sentencing Range and Thus Eligible for Modification Pursuant to 18 U.S.C. § 3582(c)(2)?

CASE AT A GLANCE

As part of the Sentencing Reform Act of 1984, Congress permitted federal district judges to "reduce the term of imprisonment" previously imposed upon a particular defendant if he had "been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The Supreme Court has not addressed the limits of eligibility for this novel "sentence modification" provision nor its application to binding plea agreements; this case brings the provision before the Court in the context of the (always controversial and consequential) federal Sentencing Guidelines recommending long prison terms for crack cocaine offenses.

Freeman v. United States
Docket No. 09-10245

Argument Date: February 23, 2011
From: The Sixth Circuit

by Douglas A. Berman
The Ohio State University Moritz College of Law

INTRODUCTION

Freeman is an important and consequential case because it could affect hundreds of sentence modification proceedings for defendants subject to long prison terms under the crack cocaine Sentencing Guidelines whose sentences were initially set through binding plea agreements. The case is also significant because how exactly the Supreme Court interprets and applies the provisions of § 3582(c)(2) could impact whether and how the Sentencing Commission in the future makes retroactive other revised Guidelines that lower recommended sentencing ranges.

ISSUE

May a federal district court, acting pursuant to its sentence modification authority set out in 18 U.S.C. § 3582(c)(2), reduce the prison term of William Freeman whose sentence for a crack offense was set and imposed pursuant to a binding plea agreement as permitted by Federal Rule of Criminal Procedure 11(c)(1)(C)?

FACTS

The legal dispute and the parties' arguments in this case are much more concerned with the law and policy surrounding the federal Sentencing Guidelines than with the specific facts surrounding the crimes and sentencing of William Freeman. Nevertheless, the relatively sympathetic facts that Freeman can emphasize concerning his case may have in part prompted the Supreme Court to grant his petition for certiorari. Consequently, even though many of the case facts may not be directly relevant to the legal issues in dispute, it is possible that the justices are uniquely concerned about how its ruling could impact sympathetic defendants like Freeman and thus it is useful to be familiar with these background details.

In September 2004, a Louisville police officer responded to a call that a robbery suspect had been identified at a liquor store. At the store, the officer recognized William Freeman from the description of the suspect. The officer asked to speak with Freeman and instructed him to put his hands on a vehicle. Freeman refused and attempted to flee on foot. A scuffle ensued, another officer arrived, and Freeman was subdued. Officers found a loaded pistol and a bag containing what turned out to be 1.6 grams of marijuana on the ground where Freeman had been lying. During a search incident to arrest, the officers found what turned out to be 3.42 grams of crack cocaine in Freeman's pants pocket.

In January 2005, Freeman was charged through a superseding indictment in the Western District of Kentucky with intent to distribute cocaine base, possessing marijuana, possessing a firearm in furtherance of a drug-trafficking crime, and being a felon in possession of a firearm. In April 2005, Freeman executed a written plea agreement "[p]ursuant to Fed. R. Crim. P. 11(c)(1)(C)," in which he agreed to plead guilty to all four counts. In exchange for Freeman's guilty plea, the government agreed "that a sentence of 106 months' incarceration [was] the appropriate disposition of this case." The plea agreement noted the likely calculation of various factors under the federal sentencing guidelines; it also indicated that Freeman understood that the district court would "independently calculate the Guidelines at sentencing," and that he "agree[d] to have his sentence determined pursuant to the Sentencing Guidelines." The district court accepted petitioner's guilty plea, and during the change-of-plea hearing, the

prosecutor explained that the parties had entered into a plea agreement pursuant to Rule 11(c)(1)(C) with a recommended sentence of 106 months of imprisonment. (This type of plea agreement is commonly referred to as "C plea.")

A subsequent presentence report (PSR) calculated the applicable Guidelines range for Freeman roughly in accord with the calculation in the plea agreement; these calculations yielded an advisory Guidelines sentencing range of 46 to 57 months of imprisonment, in addition to the 60-month mandatory consecutive sentence applicable to the gun-possession-in-furtherance-of-drug-trafficking count. In July 2005, the district court sentenced Freeman and confirmed that the parties' agreement called for a sentence of 106 months. The district court accepted the findings and Guidelines calculations in the PSR and then sentenced petitioner to 106 months of imprisonment, to be followed by five years of supervised release. The judgment stated that petitioner pleaded guilty "pursuant to a Rule [11](c)(1)(C) plea agreement."

Two years thereafter, the United States Sentencing Commission reduced the base offense levels for crack cocaine offenses by two levels and made the amendment retroactive. Freeman moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). The district court ruled that Freeman was ineligible for a sentence reduction under § 3582(c)(2) because Sixth Circuit law prohibited a reduction when the defendant had entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). A panel of the Sixth Circuit affirmed, relying on circuit precedent, with one judge concurring separately to express disagreement with that precedent.

CASE ANALYSIS

As the facts detailed above reveal, this case asks the Supreme Court to address the application and limits of a relatively novel and limited statutory federal sentencing provision allowing a downward modification of a previously imposed prison sentence. Congress, through 18 U.S.C. § 3582(c)(2), permits federal district judges to reduce the term of imprisonment previously imposed upon a particular defendant if and only if he had "been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." At issue in this case is whether a prison sentence imposed pursuant to a binding Rule 11(c)(1)(C) plea agreement can be deemed "*based on* a sentencing range" set forth in the Guidelines. [emphasis added]

Freeman contends that "common and ordinary meaning" of the term "based on" supports the conclusion that Freeman's term of imprisonment was "based on" the crack Guidelines sentencing range that was subsequently lowered by the Sentencing Commission. Freeman stresses that his "term of imprisonment was in fact at the bottom of the correctly calculated guideline range," that his plea agreement stated he "agrees to have his sentence determined pursuant to the Sentencing Guidelines," and that the district court adopted the probation officer's findings and application of the Guidelines when imposing the agreed-upon 106-month sentence. Freeman assails the Sixth Circuit for adopting a "categorical ban on § 3582(c)(2) sentence reductions in cases in which defendants entered into C plea agreements," and he highlights that "when Congress enacted § 3582(c)(2) [it] made no exception for sentences arising from such agreements."

Freeman stresses that "Rule 11(c)(1)(C) does not address sentence reductions" and he further urges the Supreme Court to reject the view adopted by some circuits that sentences arising from C plea agreements by definition can only be "based on" the agreement and never a Guidelines range. Freeman calls for the Supreme Court to "adopt the case-by-case approach of a growing number of circuits that answer the question of whether a sentence is 'based on' a subsequently amended guideline range by examining the plea agreement, the presentence report, and the sentencing transcript in each particular case." Freeman asserts that such a case-by-case approach "better reflects actual practice" because the Guidelines are a starting point and initial benchmark in plea bargaining and because district courts often defer acceptance of a C plea agreement until they have reviewed the presentence report and have considered the Guidelines. In his argument, Freeman concedes that "not every sentence that arises from a C plea agreement is 'based on' the Guidelines" but then stresses that "a conclusive presumption that no such sentence is 'based on' the Guidelines is unwarranted."

Freeman also contends that a case-by-case approach to this issue "promotes transparency in the plea bargaining process" and prevents creating a misguided "presumption that the defendant waived his or her statutory right to seek relief under § 3582(c)(2)" as part of the plea agreement. Freeman asserts that if the government wishes a defendant later to be ineligible for a § 3582(c)(2) sentence reduction, it should "as the drafter of the plea agreement … include that specific provision in the document, and it bears the consequences of its failure to do so."

The government responds that a defendant who pleads guilty pursuant to a specific-sentence agreement under Rule 11(c)(1)(C) does not have his sentence "based on" the Guidelines. In the government's words, "[a] sentence is not 'based on' whatever ultimately led to its imposition, but is, more logically, based on the element that was of binding legal consequence in its imposition." When a defendant pleads guilty pursuant to Rule 11(c)(1)(C), continues the government, "the parties' sentencing agreement binds the district court once it accepts the plea agreement, whether or not the stipulated sentence or sentencing range correlates to the defendant's applicable Guidelines range." Consequently, according to the government, the court "imposes sentence 'based on' the plea agreement, not on the defendant's Guidelines range."

The government asserts that its reading of § 3582(c)(2) is in accord with the policy statement issued by the U.S. Sentencing Commission in Guidelines § 1B1.10(b)(1). This statement provides for a prison-term reduction only to account for a Guidelines provision that was "applied when the defendant was sentenced." In the government's view, "when a defendant is sentenced pursuant to a Rule 11(c)(1)(C) agreement to a specific sentence, the Guidelines are not 'applied' at sentencing with respect to that component of the sentence."

The government claims that the parties' and the district court's consultation of the Guidelines during the plea and sentencing process does not entail that a specific sentence set forth in a Rule 11(c)(1)(C) plea agreement is "based on" the Guidelines for purposes of § 3582(c)(2). The government acknowledges that the Guidelines will typically inform the parties' plea negotiations and the district court's decision whether to accept the plea agreement, but it stresses that a

"court may accept an agreement even if its stipulated sentence falls outside the defendant's likely Guidelines range" and thus it is "the parties' agreement, once accepted, that provides the basis for the sentence."

Turning to broader policy arguments, the government stresses that plea agreements "are an essential component of the administration of justice" in which the government will often give up seeking a higher sentence or will dismiss some charges in exchange for a defendant's agreement to a fixed sentence. It contends that reading "Section 3582(c)(2) to preclude a Rule 11(c)(1)(C) defendant from obtaining a sentence reduction preserves the contractual bargain struck by the parties in their plea agreement and prevents the defendant from obtaining an additional and unwarranted sentencing benefit at the government's expense." In the government's view, "construing Section 3582(c)(2) to preclude sentence reductions for a defendant who pleaded guilty in exchange for a specific sentence or sentencing range appropriately preserves the terms of the parties' bargain and works no injustice."

SIGNIFICANCE

As detailed above, the Supreme Court in this case is technically only concerned with the meaning of the phrase "based on" in a novel and limited statutory federal sentencing provision. And, for Freeman, nine months of federal prison time is the most that hangs in the balance, as the parties appear to agree that his prison sentence would only be reduced from 106 months to 97 months were he to prevail. Nevertheless, the circuit split that exists on this seemingly small statutory issue, as well as the government's aggressive arguments to prevent Freeman from having a chance to receive a sentencing reduction, reveals that a number of deeper issues about federal sentencing practice and policy lurk beneath this seemingly minor case. Moreover, this issue comes to the justices within a case that unavoidably spotlights the long-running and still ongoing controversial and consequential debate over the very long (and recently modified) prison terms recommended by the federal Sentencing Guidelines for crack cocaine offenses.

There are significant administrative benefits both to the government and to courts in the adoption of the blanket rule that denied Freeman relief in the lower courts. The categorical statutory interpretation put forth by the government—that a defendant who pleads guilty in exchange for a specific sentence or sentencing range pursuant to an agreement entered into under Rule 11(c)(1)(C) is never eligible for a sentence reduction under § 3582(c)(2)—makes it relatively simple to resolve sentencing-reduction motions. It should always be clear from the original sentencing record when a Rule 11(c)(1)(C) plea agreement was in place, and the government plainly sees value in being able to consistently and conveniently oppose any sentence reduction for defendants in these cases.

In contrast, Freeman's argument for a case-by-case approach to this issue necessarily connotes that the parties and the court considering sentence-reduction motions will have to examine carefully the plea agreement, the presentence report, and the sentencing transcript in each particular case. And, though Freeman's case presents a strong factual basis for his assertion that the sentencing term set forth in his Rule 11(c)(1)(C) plea agreement was pegged to the applicable guideline, in many other cases it may be quite difficult to reach such a confident determination.

Intriguingly, just how many defendants may be impacted by this case is uncertain. Though tens of thousands of defendants have been prosecuted for crack offenses, and most had their cases resolved through plea agreement, a precise count of how many cases are resolved through Rule 11(c)(1)(C) agreements is not readily available. In some federal districts, such plea agreements are quite rare; in others, they are more common. Even less clear is whether most or even many defendants who did enter into Rule 11(c)(1)(C) agreements would be able to make as strong a factual showing as Freeman if the Supreme Court ultimately were to rule that the "based on" determination must be made on a case-by-case basis.

In the end, the parties' competing statutory arguments are both plausible, and the justices' determination may turn on just how limited and narrow they think Congress wanted to define the statutory authority it gave to district judges to reduce some prison terms sentences. Justices who believe that Congress created the novel § 3582(c)(2) authority because it was very important for past-sentenced defendants to benefit from newly reduced sentencing terms will likely be drawn to Freeman's seemingly modest claim that defendants who entered into Rule 11(c)(1)(C) agreements ought to have their eligibility for a sentence modification determined on a case-by-case basis. But those justices with a special concern for finality in initial criminal sentencing outcomes (or who think plea policy and practice is better served when future sentence modifications are mostly unavailable) may be drawn to an interpretation of § 3582(c)(2) that conclusively closes out a certain category of defendants from seeking a sentence modification.

Douglas A. Berman is the William B. Saxbe Designated Professor of Law at The Ohio State University Moritz College of Law. Professor Berman is the creator and sole contributor to weblog, Sentencing Law and Policy, http://sentencing.typepad.com. He can be reached at berman.43@osu.edu or 614.688.8690.

PREVIEW of United States Supreme Court Cases, pages 217–219.

ATTORNEYS FOR THE PARTIES

For Petitioner William Freeman (Frank W. Heft Jr., 502.584.0525)

For Respondent United States (Neal Kumar Katyal, Acting Solicitor General, 202.514.2217)