No. 09-10245

IN THE

Supreme Court of the United States

WILLIAM FREEMAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

William Freeman was sentenced to a term of imprisonment within a guideline range that the Sentencing Commission subsequently lowered and made retroactive. Title 18 U.S.C. §3582(c)(2) authorizes district courts to reduce a previously imposed term of imprisonment that was "based on" a retroactively lowered sentencing range. Section 3582(c)(2) is "intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon v. United States*, 130 S. Ct. 2683, 2692 (2010).

The government claims that all defendants who enter into plea agreements recommending a specific sentence or range under Rule 11(c)(1)(C) are categorically ineligible to be considered for a sentence reduction under §3582(c)(2), even when, as here, the plea agreement expressly states the parties' intent that the defendant be sentenced within the correctly calculated guideline range, the court defers acceptance of the agreement until the probation officer confirms that the parties' calculation of the guideline range is correct, and the court expressly adopts the probation officer's application of the guidelines and sentences the defendant within the guideline range.

The government reaches this counterintuitive conclusion by arguing that (1) "based on" means "that which is legally binding," (2) Rule 11(c)(1)(C) legally binds the court to impose sentence in compliance with the agreement once accepted, (3) therefore, a sentence recommended in a C plea agreement is necessarily "based on" the agreement and not the guideline range and may never be reduced under §3582 regardless of what actually occurred.

The government's proposed definition of "based on" is inconsistent with the ordinary meaning of the phrase, does not appear in the statute, and is contrary to clear evidence that Congress chose not to adopt it. Its argument that Rule 11(c)(1)(C) "legally binds" the court never to reduce a sentence once it has been imposed lacks any basis in the rule itself, and is contrary to §3582 as a whole and the Rules Enabling Act. The case-by-case approach adopted by a number of lower courts allows the statute to function without unnecessarily precluding relief for defendants like Mr. Freeman whose sentences were clearly "based on" the guideline range. The government is wrong that determining eligibility for relief under this approach results in unjustified windfalls. Once a court finds a defendant to be eligible for a sentence reduction, it next decides whether to reduce the sentence at all, and if so, by how much. There is no justification for creating limits on eligibility in the name of possible windfalls that courts have the power to avoid if they exist.

I. THE GOVERNMENT'S PROPOSED DEFINITION OF "BASED ON" AS "THAT WHICH IS LEGALLY BINDING" IS CONTRARY TO THE TEXT, FUNCTION AND PURPOSE OF SECTION 3582(c)(2).

The government begins, not with the text of §3582(c)(2), but by invoking finality. U.S.Br. 20-21. But "Section 3582(c)(2) establishes an exception to the general rule of finality." *Dillon*, 130 S. Ct. at 2690. "Notwithstanding the fact that a sentence to imprisonment can subsequently be . . . modified pursuant to the provisions of subsection (c) . . . a judgment of conviction that includes such a sentence constitutes a final judgment for all *other* purposes." 18

U.S.C. §3582(b) (emphasis supplied). The text of §3582(c)(2) provides no more assistance to the government than finality does.

A. The Government's Proposed Definition of "Based On" Fails Under the Plain Language of §3582(c)(2).

The government contends that "based on" means "the element that was of binding legal consequence," or "that which is legally binding," U.S.Br. 26, 27; that Rule 11(c)(1)(C) binds the court to impose an agreed sentence once it accepts the agreement; and thus, such a sentence is never "based on" a subsequently lowered guideline range even when it was within the correctly calculated guideline range. *Id.* at 22, 29, 32.

Mr. Freeman's term of imprisonment was "based on" the retroactively lowered crack cocaine guideline under the ordinary dictionary definitions offered in his opening brief, *see* Pet.Br. 16 (*e.g.*, "serve as a base for," "form a foundation for," "point from which (something) can develop"), any definition offered by the government, *see* U.S.Br. 24 (*e.g.*, "use as a . . . basis for," "a fundamental principle or underlying concept"), and other common definitions. *See* Oxford English Dictionary ("supporting part," "structure . . . underlying some system of activity or operations; the resources, etc., on which something draws or depends for its operation"), http://www.oed.com/; Merriam-Webster Dictionary ("bottom of something considered as its foundation," "principal component of something," "something on which something else is established or based," "an underlying condition or state of affairs"), www.merriam-webster.com.

The government, however, claims that "based on" means "the element that was of binding legal consequence in [the sentence's] imposition." U.S.Br. 27. But those words do not fit any common definition of the phrase, nor do they appear in §3582(c)(2). This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). The Court should not do so here.

If an element of a sentence must be "of binding legal consequence in its imposition" in order for the sentence to be "based on" it, then the guideline range itself would have to be legally binding in order for the sentence to be "based on" it. Under the government's definition, no defendant, with or without a C plea agreement, would ever be eligible for relief. The Guidelines are not legally binding, *United States v. Booker*, 543 U.S. 220 (2005), and may not be treated as such even when the court ultimately imposes a sentence within the guideline range. *Rita v. United States*, 551 U.S. 338, 351 (2007). Yet relief is available under §3582(c)(2) whether the term of imprisonment was within or outside the non-binding guideline range.[1]

Moreover, reading the government's definition into the statute would create an exclusion that Congress chose not to create. When Congress enacted §3582(c)(2) and §3742 in the Sentencing Reform Act of 1984, it provided two ways

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[1] *See* USSG §1B1.10(b)(2)(B), p.s. ("a reduction comparably less than the amended guideline range . . . may be appropriate"); *id.*, comment. (n.3) (same); *Dillon*, 130 S. Ct. at 2691-92 (same); *United States v. Franklin*, 600 F.3d 893, 896 (7th Cir. 2010) (below-guideline sentence specified in a C plea agreement may be "based on" the guideline range if the agreement "evidence[s] an intent to tie the sentence to the guidelines").

in which an otherwise final sentence may be modified. *See* 18 U.S.C. §3582(b)(1), (3). It allowed a defendant to appeal a sentence "specified in a plea agreement" under Rule 11(e)(1)(C) on the same grounds as any other sentence, except upon the ground that the sentence was greater than the applicable guideline range unless it was also greater than the sentence specified in the agreement,[2] and this remains the law today. *See* 18 U.S.C. §3742(a), (c) (2010). But Congress has not excluded from § 3582(c)(2) any type of sentence included in a C plea agreement.

Contrary to the government's contention that Congress's failure to write §3582(c)(2) "to cover defendants who agree to specific sentences under Rule 11(c)(1)(C)" somehow helps its cause, U.S.Br. 30-31, the differential treatment of appeals and reductions of sentences specified in C plea agreements is clear evidence that Congress intentionally chose not to exclude such sentences from §3582(c)(2). "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994). Section 3742 "shows that Congress knew how to draft a [limitation in §3582(c)(2) if] it wanted to," *Chicago*, 511 U.S. at 338, and this Court refrains from "reading a phrase into the statute when Congress has left it out." *Keene Corp.*, 508 U.S. at 208.

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[2] *See* 18 U.S.C. §3742(a)(1)-(4) (1987), added by Pub. L. No. 98-473, §213 (Oct. 12, 1984). The structure was changed in 1988, but the limitation remained the same. *See* Pub. L. No. 100-690, §7103(a)(8) (Nov. 18, 1988).

The government also suggests that a defendant cannot appeal a sentence imposed pursuant to a C plea agreement on the ground that it was "imposed as a result of an incorrect application of the sentencing guidelines" under §3742(a)(2). U.S.Br. 31 n.10. While acknowledging that §3742 says no such thing, the government asserts that "such a limitation was unnecessary because the sentence in such a case is the result of the parties' agreement, which binds the district court, and not of any 'application' of the Guidelines." *Id.* Aside from the circularity of this argument, which depends entirely on the government's theory that a C plea agreement necessarily means that the guidelines were not applied, it is incorrect. Under the plain terms of §3742(a) and (c), a defendant may appeal a sentence imposed pursuant to a C plea agreement on the ground that the sentence was "imposed as a result of an incorrect application of the sentencing guidelines."[3] Thus, §3742 recognizes that the guidelines may be applied in cases involving C plea agreements, as they were here.

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[3] *See, e.g.*, *United States v. Smith*, 918 F.2d 664, 669 (6th Cir. 1990) (§3742(c)(1) does not bar a defendant from "appeal[ing] his sentence under 18 U.S.C. §3742(a)(1) or (a)(2), which permit appeals of sentences 'imposed in violation of law' and 'imposed as a result of an incorrect application of the sentencing guidelines[.]'"); *United States v. Carrozza*, 4 F.3d 70, 86 n.12 (1st Cir. 1993) ("defendant may . . . appeal a sentence pursuant to a Rule 11(e)(1)(C) plea agreement on the grounds that the sentence was imposed in violation of law or as a result of an incorrect application of the guidelines"); *United States v. Silva*, 413 F.3d 1283, 1284 (10th Cir. 2005) (defendant who "agrees to and receives a specific sentence" may appeal "if it was (1) imposed in violation of law, (2) imposed as a result of an incorrect application of the guidelines, or (3) is greater than the sentence set forth in the plea agreement.").

B. This Court's Interpretation of "Based Upon" in a Different Statute Fails to Support the Government's Proposed Definition and Instead Supports the Ordinary Meaning of "Based On" in §3582(c)(2).

Rather than relying on the language and context of §3582(c)(2), the government seeks support from decisions interpreting "based on" or "based upon" in other statutes. U.S.Br. 24-27 & n.9.

The government relies primarily on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). U.S.Br. 24-26. The statute at issue there provided an exception to immunity of a foreign state from suit in the courts of the United States "in any case 'in which the action is based upon a commercial activity carried on in the United States by the foreign state.'" *Id.* at 356 (quoting 28 U.S.C. §1605(a)(2)). In interpreting the phrase "based upon," the Court relied on (1) the common dictionary definition, (2) the surrounding statutory language, (3) the particular facts made relevant by the statute's requirements, and (4) the purpose of the statute. *Id.* at 357-58, 363.

The Court first determined that the phrase "based upon," as defined in the dictionary and as used in 28 U.S.C. §1605(a)(2), meant "conduct that forms the 'basis,' or 'foundation,' for a claim," and "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. The Court then examined the complaint to identify the conduct upon which the suit was based. The plaintiff alleged personal injury resulting from unlawful detention and torture by the Saudi Government, after having been recruited and hired in the United States. *Id.*

at 351. Since the plaintiff did not allege breach of contract in recruitment and hiring, but personal injuries caused by intentional and negligent wrongs, "[t]hose torts, and not the arguably commercial activities that preceded their commission, form[ed] the basis for the . . . suit." *Id.* at 358. The commercial acts that "led to the conduct that eventually injured the [plaintiffs] . . . are not the basis for [the] suit." *Id.* at 358.

Nelson supports Mr. Freeman's position. The Court used the dictionary definition and surrounding statutory language to determine the meaning of "based upon." The Court examined the allegations in the complaint to "identify[] the particular conduct on which [the] action [was] 'based' for purposes of the Act." *Id.* at 351, 356. *Nelson* thus demonstrates the commonsense proposition that to determine what a thing is "based on," the relevant facts must be examined. Similarly, under §3582(c)(2), courts must examine the plea agreement and sentencing record to determine whether the term of imprisonment was "based on" a subsequently lowered guideline range.

The government claims to derive its definition from *Nelson*'s reading of "based upon" to mean "elements of a claim that . . . would entitle a plaintiff to relief," and its statements that the commercial conduct that "led to" the tortious conduct was not enough to be the basis of the suit, nor was a "connection" between them. U.S.Br. 25, 27. But these passages have no relevance beyond the statute at issue there. That statute required claims based upon acts that were commercial in nature, committed in the United States, and actionable, and it specifically distinguished between "a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such

activity." *Id*. at 357-58 & n.4. In contrast, §3582(c)(2) contains no requirements or distinctions but only that the term of imprisonment was "based on" a subsequently lowered guideline range.

Further, the "manifest purpose" of the statute in *Nelson* was to "codify the restrictive theory of foreign sovereign immunity." *Id*. at 363. The purpose of §3582(c)(2) is not "restrictive," but rather is "intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon*, 130 S. Ct. at 2692. Congress intended that the "value" of §3582(c)(2) would be "the availability of *specific review* and reduction of a term of imprisonment . . . to respond to changes in the guidelines," S. Rep. No. 98-225, at 56 (1983) (emphasis supplied), where, as here, the Commission makes an amendment retroactive "because of a change in the community view of the offense." *Id*. at 180.[4] Under the government's definition, "specific review" is categorically prohibited for any specific sentence or range recommended in a C plea agreement. There is no support for the government's rule.

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[4] The community view of crack offenses has dramatically changed, as evidenced by the two-level reduction at issue here, and by Congress's recent enactment of the Fair Sentencing Act of 2010, in which it changed the powder-to-crack quantity ratio from 100:1 to approximately 18:1, and directed the Commission to promulgate temporary, emergency amendments reflecting that ratio. *See* Pub. L. No. 111-220, 124 Stat. 2372. The Commission promulgated emergency amendments effective November 1, 2010, and is considering permanent amendments and whether the amendments should be made retroactive. *See* 76 Fed. Reg. 3193-02, 3194-95 (Jan. 19, 2010).

C. The Exceptions to the Government's Rule Demonstrate That It Lacks Any Principled Basis.

The government claims that, by virtue of its definition of "based on" as "legally binding" and the binding nature of a C plea agreement under Rule 11(c)(1)(C), no recommendation in a C plea agreement can ever be "based on" a guideline range. But the rule has exceptions. Noting that Rule 11(c)(1)(C) provides for agreement to a "specific sentence or sentencing range," 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), the government asserts that "[a]n agreement that a Guidelines provision *does* apply, without any accompanying agreement to a specific sentence, would not preclude the resulting sentence from being 'based (in part) on' that Guidelines provision." U.S.Br. 35 (emphasis original).[5]

Under the government's proposed reading, when the parties agree, as they did here, that a defendant's offense level and criminal history would be determined at a certain level and category under specified guideline provisions, *see* J.A. 27a-28a, producing a certain guideline range, the resulting term of imprisonment would be "based on" the guideline range, and relief under §3582(c)(2) would be available. But if the parties go on, as they did here, to agree to a sentence within the agreed range, the term of imprisonment would not be "based on" the guideline range, and relief would be absolutely precluded.

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[5] The other exception is irrelevant because it does not involve a "term of imprisonment." U.S.Br. 35 & n.11.

The government's argument demonstrates that its rule must fail. There is no principled reason, let alone any textual grounding, for the proposition that a sentence under one of these agreements may be "based on" a subsequently lowered guideline range, but the other must not. In both cases, the guidelines form a basis for the sentence. If any of the specified guidelines is subsequently lowered, and the decrease is made retroactive, discretionary relief under §3582(c)(2) is available.

II. RULE 11(c)(1)(C) DOES NOT TRUMP SECTION 3582(c)(2).

The government's argument also fails because it depends upon the contention that Rule 11 (c)(1)(C) "legally binds" the court never to reduce a sentence once it has been imposed. U.S.Br. 22, 26, 28-32. This contention not only lacks any basis in Rule 11(c)(1)(C), but is also contrary to §3582 as a whole and the Rules Enabling Act.

An agreed sentence, range, or guideline provision in a C plea agreement "binds the court once the court accepts the plea agreement," Fed. R. Crim. P. 11(c)(1)(C), and "the agreed disposition [is then] included in the judgment." Fed. R. Crim. P. 11(c)(4). But a "sentence to imprisonment can *subsequently* be" modified or corrected in specified ways, though "such a sentence constitutes a final judgment *for all other purposes*." *Id.*, §3582(b) (emphasis supplied). Section 3582(c)(2) "giv[es] courts the power to 'reduce' an otherwise final sentence." *Dillon*, 130 S. Ct. at 2690. The "court may ... modify a term of imprisonment once it has been imposed" by "reduc[ing] the term of imprisonment ... 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." *Id.*, §3582(c) (emphasis supplied).

Rule 11(c)(1)(C) does not purport to limit the court's statutory authority to later "reduce" an otherwise final sentence under §3582(c)(2) "once it has been imposed," nor could it. A rule of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). A rule of procedure may "govern[] only 'the manner and the means' by which the litigants' rights are 'enforced,'" but may not "alter[] 'the rules of decision by which [the] court will adjudicate [those] rights." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (internal citations omitted). Under the government's theory, Rule 11(c)(1)(C) would alter the rules of decision by which courts adjudicate defendants' rights under §3582(c)(2) by giving "content to the statutory inquiry" into what a sentence was "based on." U.S.Br. 45. That "content," according to the government, is that a specific sentence in a C plea agreement is necessarily based solely on the agreement and thus may not be reduced under §3582(c)(2). U.S.Br. 28-30, 32-33. If the government is correct, the rule is invalid.

Nor does the Commission's policy statement endorse the government's theory. The government claims that the phrase, "guideline provisions that were applied when the defendant was sentenced," lifted from USSG §1B1.10(b)(1), p.s., means that the "Commission has plainly stated that the sentence-modification power extends only to the parts of the Guidelines that 'were applied when the defendant was sentenced.'" U.S.Br. 32. The government claims that it would be "inconsistent with" this phrase to permit examination of the actual facts because: "The court

does not 'appl[y]' the Guidelines at that point but instead imposes the specific sentence to which the parties had agreed," which "by the express terms of Rule 11(c)(1)C), 'binds the court' after it accepts the guilty plea." U.S.Br. 32-33.

The phrase in no way supports the government's insistence that the guidelines are never applied when a C plea agreement recommends a specific sentence. The point of the subsection in which the phrase appears is that "guideline application decisions" other than the substitution of the amended range for the initial range are to be left "unaffected," and nothing more.[6] *Dillon*, 130 S. Ct. at 2694.

III. THE CASE-BY-CASE APPROACH ALLOWS THE STATUTE TO FUNCTION.

Under the case-by-case approach, the district court determines from the terms of the plea agreement and the sentencing record whether the term of imprisonment was "based on" a subsequently lowered guideline range. District court judges who impose sentences are "certainly capable of . . . identifying those Rule 11(c)(1)(C) sentences that were based on Guideline ranges that were subsequently modified, and those that were not." J.A. 88a (White, J. concurring).

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[6] "[T]he court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." USSG §1B1.10(b)(1), p.s.

The government claims that only one circuit has adopted the case-by-case approach, U.S.Br. 22, while citing in a footnote several cases applying that approach. *Id*. at 22-23 n.8. Four circuits apply the case-by-case approach,[7] two circuits have said that it may apply,[8] and three circuits foreclose any examination of the facts.[9]

Examining the plea agreement and the sentencing record is the only way to reliably determine whether a term of imprisonment was in fact "based on" a subsequently lowered guideline range, without unnecessarily prohibiting relief for defendants like Mr. Freeman. A rigid insistence that a sentence included in a C plea agreement is never "based on" a guideline range is contrary to the broad

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[7] *See United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009) ("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"), *cert. denied*, 130 S. Ct. 1160 (2010); *United States v. Cobb*, 584 F.3d 979, 983-84 (10th Cir. 2009) (plea agreement, change of plea hearing, and sentencing hearing reflected that sentence "was tied to the guidelines at every step"); *United States v. Franklin*, 600 F.3d 893, 897 (7th Cir. 2010) (not "all Rule 11(c)(1)(C) plea agreements foreclose relief under section 3582(c)(2)," but record must "reflect an intent to tie the sentence to the guidelines"); *United States v. Williams*, 609 F.3d 368, 372-73 (5th Cir. 2010) (declining to "adopt a categorical rule" and instead reviewing "the plea agreement, sentencing record, and applicable guidelines").

[8] *See United States v. Main*, 579 F.3d 200, 204 (2d Cir.), *cert. denied*, 130 S. Ct. 1106 (2009); *United States v. Berry*, 618 F.3d 13, 17 (D.C. Cir. 2010).

[9] *See United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004); *United States v. Scurlark*, 560 F.3d 839, 841-43 (8th Cir.), *cert. denied*, 130 S. Ct. 738 (2009); *United States v. Sanchez*, 562 F.3d 275, 282 & n.8 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1053 (2010).

remedial purpose of §3582(c)(2). *See Dillon*, 130 S. Ct. at 2692; S. Rep. No. 98-225, at 56, 180 (1983).

The government offers nothing to refute the soundness of the case-by-case approach other than to assert, incorrectly, that it requires only that the guidelines played some role in the parties' negotiations and would mean that all sentences are "based on" the guidelines. U.S.Br. 33, 36 n.12. As several courts of appeals have held, an agreed upon sentence is not "based on" a guideline range when the plea agreement and the sentencing record do not evidence an intent to tie the sentence to the guideline range.[10] No court of appeals has found that a sentence outside the guideline range was "based on" the range. *But see* USSG §1B1.10(b)(2)(B), p.s.; *id.*, comment. (n.3); *Franklin*, 600 F.3d at 897.

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[10] *See, e.g*, *Bride*, 581 F.3d at 891 (sentence eleven years shorter than low end of guideline range was not "based on" guideline range where parties did not "agree that the recommended sentence was in any way dependent upon or connected to the applicable Guidelines sentencing range"); *Franklin*, 600 F.3d at 896-97 (plea agreement "does not reflect an intent to tie the sentence to the guidelines," because it "did not state that the 157-month term was based upon the guidelines, and it did not explain how the parties chose the 157-month term," nor was the court's sentence tied to the correctly calculated range); *Williams*, 609 F.3d at 373 ("plea agreement never stated that the stipulated sentence depended on, or was even connected to, the applicable guideline range," and a "review of the sentencing transcript does not suggest that the district court based its decision on a guideline calculation"); *United States v. Trujeque*, 100 F.3d 869, 870 & n.2, 871 (10th Cir. 1996) (the "facts establish that Mr. Trujeque's sentence was not 'based on a sentencing range that has subsequently been lowered,'" where stipulated sentence was below the guideline range without explanation of how it was reached).

When, as here, the plea agreement expressly states the parties' intent that the term of imprisonment will not only be "tied to the guidelines," but within the correctly calculated guideline range, and the sentencing judge independently determines that it is within the correctly calculated guideline range and imposes that sentence, the term of imprisonment was "based on" the guideline range. *See Cobb*, 584 F.3d at 983.

IV. MR. FREEMAN'S TERM OF IMPRISONMENT WAS "BASED ON" A SUBSEQUENTLY LOWERED GUIDELINE RANGE.

At the change of plea hearing, the court advised Mr. Freeman that the guidelines were "advisory," but that "in order to follow them, the Court directs that the probation officer do a probation report," J.A. 39a-40a, and that the sentence would not be known "until the presentence report is completed." J.A. 40a. The prosecutor stated that "Mr. Freeman is agreeing to have his sentence determined to the Federal Sentencing Guidelines," that "we have set out our best judgment and belief how they apply in this case, and that's in numbered paragraph 11 of the plea agreement," J.A. 43a-44a, and "have agreed upon a recommended sentence that we will jointly provide to the Court," which it may accept or reject "[a]t the time of sentencing." J.A. 41a-42a. At the change of plea hearing, the court "accepted the defendant's plea of guilty," J.A. 34a-35a, but deferred acceptance of the agreement until sentencing. *See* Fed. R. Crim. P. 11(c)(3)(A).

At sentencing, defense counsel stated that the agreed sentence was within the advisory guideline range calculated by the probation officer, and requested that

the court accept the agreement. The court did so, stating that "[t]he Court will adopt the findings of the probation officer disclosed in the probation report and application of the guidelines as set out therein," J.A. 47a, and that "the sentence imposed . . . fall[s] within the guideline range[] and [is] sufficient to meet the objectives of the law." J.A. 49a. The court "adopt[ed] the presentence report and guideline applications without change." J.A. 95a.

The government's only response to the facts is that Mr. Freeman "overstates" the importance of ¶12 of the plea agreement (which provides, "Defendant agrees to have his sentence determined pursuant to the Sentencing Guidelines," J.A. 28a), because there was still a "need for the court to use the Guidelines to determine" aspects of the sentence other than the term of imprisonment, and "there were still reasons, independent of the term of imprisonment, to calculate petitioner's offense level and criminal history score." U.S.Br. 38-39.

The government's suggestion that the parties agreed that Mr. Freeman's sentence would be determined by the Guidelines for some purpose other than setting the "term of imprisonment," or that the court did not use the Guidelines for that purpose, lacks any support. Paragraph 10 states that the government "agree[s] that a sentence of 106 months' incarceration is the appropriate disposition of this case." J.A. 26a. Paragraph 11 shows the parties' calculation of the offense level and criminal history category to reach that disposition, and states that "the defendant understands that the Court will independently calculate the Guidelines at sentencing." J.A. 27a-28a. Paragraph 12 states that the defendant "agrees to have his sentence determined pursuant to the Sentencing

Guidelines." J.A. 27a-28a. The court used the guidelines at sentencing to impose a term of imprisonment. J.A. 47a-51a.

V. THERE IS NO "UNJUSTIFIED WINDFALL" IN PERMITTING JUDGES TO DETERMINE WHETHER A DEFENDANT IS ELIGIBLE FOR RELIEF UNDER §3582(c)(2).

The government argues that permitting judges to determine whether a defendant's term of imprisonment was in fact "based on" a subsequently lowered guideline range would give defendants an "unjustified windfall." U.S.Br. 40. But this misapprehends the statute. When a judge finds that a defendant is eligible for relief under the first clause of §3582(c)(2), this does not result in an automatic reduction, a windfall, or a reduction that is in any way unfair to the government. Under the case-by-case approach, the court determines eligibility by reviewing the record to determine whether the term of imprisonment was "based on" a subsequently lowered guideline range. If it was, the court considers whether to reduce the sentence at all, and if so by how much (within the amended range), guided by the factors set forth in §3553(a).

If the government believes that a defendant would receive an unjustified windfall because of circumstances such as dismissal of charges or lesser charges, U.S.Br. 40, 42-43 & n.16, 47-48, it is free to persuade the court that such circumstances show that a reduction is unwarranted. The court can decline to reduce the sentence at all, or reduce it less than the full amount. There is no justification for creating limits on eligibility in the name of possible

windfalls that the court has the power to avoid if they exist.

The government fails to identify any windfall to Mr. Freeman, much less one that should totally disqualify him from eligibility for relief. It states that he "obtained the certainty of a 106-month sentence, which reflected a sentence at the bottom of his anticipated Guidelines range and avoided the possibility that his record would result in a higher Guidelines sentence, an upward variance, or an upward departure based on under-representation of his criminal history." U.S.Br. 43-44. There is no evidence that the parties or the court thought that Mr. Freeman might receive an upward departure or variance. To the extent the criminal history category might have been greater than the parties believed, J.A. 43a, they calculated it correctly. J.A. 128a. The government received the benefit of its bargain: Mr. Freeman received the agreed sentence at the bottom of the applicable Guideline range, while waiving his rights to trial, appeal, and collateral attack; the government did not bargain for a waiver of §3582(c)(2) relief. The district court appears not to have thought that a reduction in sentence would constitute a "windfall," but rather "felt constrained to deny Freeman's motion" by *Peveler*. J.A. 69a, 75a.

The government also contends that defendants assume the risk of a favorable change in law when they enter into a plea agreement. U.S.Br. 42. This contention provides no basis for holding that a defendant who entered a C plea is ineligible for relief under §3582(c)(2). The statute's very purpose is to provide a defendant with the opportunity to benefit from a favorable change in the applicable guideline range after he has been sentenced. Unless there has

been an express affirmative waiver of §3582(c)(2) relief, a defendant who pleads guilty is not foreclosed from being considered for such relief.[11]

None of the cases the government cites support its argument, and one disproves it. *United States v. Sahlin*, 399 F.3d 27 (1st Cir. 2005), and *United States v. Silva*, 413 F.3d 1283 (10th Cir. 2005), each involved a challenge on direct appeal to the validity of a sentence imposed pursuant to a guilty plea entered before *Booker* and premised on an incorrect understanding that the guidelines were mandatory. While both courts referred to the "normal risk" of a favorable change in the law such as *Booker* in rejecting the arguments, *see Sahlin*, 399 F.3d at 29; *Silva*, 413 F.3d at 1284, this principle related only to the question whether *Booker* undermined the legality of the sentence or guilty plea. Neither case involved the denial of relief under §3582(c)(2) or addressed whether the defendant might be eligible for such relief.

United States v. Robinson, 587 F.3d 1122 (D.C. Cir. 2009), demonstrates that the "assumption of risk" principle does not answer the question whether defendants sentenced pursuant to C plea agreements are eligible to seek relief under § 3582(c)(2), and supports Mr. Freeman here. The defendant sought to withdraw his guilty plea before sentencing because, he argued, the Commission had

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[11] *See, e.g.*, *United States v. Isaacs*, 301 Fed. Appx. 183, 187 (3d Cir. 2008); *United States v. Cooley*, 590 F.3d 293, 296-97 (5th Cir. 2009); *United States v. Woods*, 581 F.3d 531, 534-36 (7th Cir. 2009); *United States v. Monroe*, 580 F.3d 552, 556 (7th Cir. 2009); *United States v. Goodwin*, 393 Fed. Appx. 417, 419 (8th Cir. 2010); *United States v. Leniear*, 574 F.3d 668, 672 & n.3 (9th Cir.2009); *United States v. Chavez-Salais*, 337 F.3d 1170, 1172-73 (10th Cir. 2003).

reduced the guidelines for crack offenses. Applying the risk principle to uphold the guilty plea as valid, the court ruled that a guilty plea is not "automatically tainted" by a favorable change in the guideline range. *Id.* at 1129. The court distinguished this case from those in which courts granted reductions under §3582(c)(2) in cases involving C pleas, because in this case, the defendant "moved to withdraw his guilty plea, not reduce his sentence." *Id.* at 1129 n.9. In fact, the defendant moved separately for a reduction under §3582(c)(2), which the district court considered but denied because the applicable guideline range was not based on crack, but on another drug. *See* Order, *United States v. Dodd*, Crim. No. 04-128-06 (D.D.C. Mar. 20, 2009).

As *Robinson* shows, district courts are fully capable of determining, on a case-by-case basis, whether sentences imposed under C plea agreements are "based on" a guideline range that was subsequently lowered. There is no reason to contort the text of 3582(c)(2) to categorically prohibit such determinations.

CONCLUSION

For the above-stated reasons and those given in Mr. Freeman's opening brief, the judgment of the court of appeals should be reversed and the case remanded to the district court for consideration of Mr. Freeman's motion under §3582(c)(2).

Respectfully Submitted,

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