

12-3685

To Be Argued By:
SANDRA S. GLOVER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3685

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICARDO LEONARDO, YENNY GUZMAN,
Defendants,

PEDRO LORA, aka SMOKEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment on January 24, 2006. Appendix 4 (“A__”), A225-27. After the sentence was vacated on appeal, *see* A260, the district court entered an amended judgment on June 8, 2006, A5, A261-63.

On October 24, 2011, the defendant filed a *pro se* motion under 18 U.S.C. § 3582(c)(2) seeking a modification of his sentence. A5. On November 23, 2011, defense counsel filed another motion seeking relief for the defendant under 18 U.S.C. § 3582(c)(2). A6, A273. The district court (Alfred V. Covello, J.) denied the defendant’s request for relief in a written ruling dated August 30, 2012; that ruling was entered on the docket September 5, 2012. A6, A285-88. On September 12, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A6, A289. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

**Statement of Issue
Presented for Review**

The defendant pleaded guilty and was sentenced to 15 years' imprisonment pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). After the Sentencing Commission reduced the guideline ranges for crack cocaine offenses and made those changes retroactive in 2011, the district court denied the defendant's motion to reduce his sentence in light of those changes. Did the district court properly deny the defendant's motion when the agreed-upon sentence in the defendant's plea agreement was in no way tied to the guidelines range?

United States Court of Appeals

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Appellee,

-vs-

PEDRO LORA, aka SMOKEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In 2005, the defendant-appellant, Pedro Lora, pleaded guilty to a drug conspiracy charge pursuant to a binding Rule 11(c)(1)(C) plea agreement with an agreed-upon sentence of not less than 15 years' imprisonment, and the district court imposed that agreed-upon sentence. After the Sentencing Commission reduced the guidelines ranges for crack cocaine offenses and made those changes retroactive in 2011, Lora moved

for a reduced sentence based on those new ranges. The district court denied Lora's motion because the crack cocaine guidelines were not used to calculate the agreed-upon sentence. Because this result is fully consistent with the Supreme Court's decision in *Freeman v. United States*, 131 S. Ct. 2685 (2011), the district court's judgment should be affirmed.

Statement of the Case

On March 17, 2005, a federal grand jury indicted the defendant, Pedro Lora, on one count of conspiracy to possess with the intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii) and 846, and one count of possession with the intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). A2, A7-9. The defendant pleaded guilty to the conspiracy count on September 19, 2005 pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) with an agreed-upon sentence of not less than 15 years' imprisonment. A3, A10-20.

The district court initially sentenced the defendant to 132 months' imprisonment, A4, A225, but after that sentence was vacated on appeal by this Court, A260, the district court sentenced him to 180 months' imprisonment after accept-

ing the binding plea agreement under Rule 11(c)(1)(C), A5, A261-63.

On October 24, 2011 and November 23, 2011, the defendant filed motions seeking a reduced sentence under 18 U.S.C. § 3582(c)(2) and the newly retroactive crack cocaine sentencing guidelines. A5, A6, A273. The district court (Alfred V. Covello, J.) denied the requested relief in an order dated August 30, 2012. A6, A285-88. That ruling entered on the docket September 5, 2012, A6, and on September 12, 2012, the defendant filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(b), A6, A289.

The defendant is still serving the sentence imposed by the district court.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. Lora's guilty plea and sentencing

In 2005, Lora entered into a crack cocaine distribution conspiracy. *See* A18-20 (stipulation of offense conduct). This conduct eventually led to his indictment for conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(A)(iii) and 846, and for possession with the intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C.

§ 841(a)(1). A7-9. At the time, these charges subjected Lora to a mandatory minimum sentence of 10 years' imprisonment.

On September 19, 2005, Lora pleaded guilty to the conspiracy charged in Count One of the indictment, pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). A3, A10-20. In this agreement, Lora and the government acknowledged that given Lora's criminal history, the government could have filed two informations under 21 U.S.C. § 851 that would have subjected Lora to a mandatory term of life imprisonment. A13. In lieu of these filings, the parties agreed that Lora should be sentenced to 15 years' imprisonment:

The defendant and the Government therefore agree that the defendant's guilty plea is entered pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure and that, assuming the Court accepts this plea agreement, a sentence that includes a term of imprisonment of not less than 15 years is a reasonable and appropriate disposition of this case.

A13. Given this agreement on the sentence to be imposed in the case, the government agreed to dismiss Count Two of the indictment if the district court accepted the plea agreement. A16. The parties further agreed, however, that if the

court sentenced Lora *below* 15 years, the plea agreement was “null and void.” A13.

As relevant here, the plea agreement noted that the district court would calculate Lora’s sentencing guidelines at sentencing, A12, but the agreement did not contain any agreed-upon calculation of those guidelines by the parties.

Prior to sentencing, the United States Probation Office produced a Pre-Sentence Report (“PSR”) that set forth a guideline calculation for Lora. According to the PSR, using the 2004 Sentencing Guidelines Manual, Lora’s base offense level based on a drug quantity of 708.22 grams of crack cocaine was 36, PSR ¶ 20; this level was increased by 2 levels for Lora’s role as a supervisor of the offense conduct, PSR ¶ 22. The PSR noted, however, that Lora qualified as a career offender under U.S.S.G. § 4B1.1(b), and thus his adjusted offense level was 38.¹ PSR ¶ 26. After reducing the adjusted offense level by 3 points for acceptance of responsibility under U.S.S.G. § 3E1.1, Lora’s total offense level was 35. PSR

¹ This calculation from the PSR appears to be a mistake, because the career offender offense level would be 37, not 38. This mistake has no bearing here, where Lora’s adjusted offense level without the career offender designation was 38, and thus his total offense level was 35 under either calculation.

¶ 28. When combined with Lora's criminal history category of VI, PSR ¶ 32, Lora's recommended guidelines range was 292-365 months' imprisonment, PSR ¶ 67.

At sentencing on January 17, 2006, the district court adopted the guidelines calculation as set forth in the PSR, A166, resulting in a range of 292-365 months' imprisonment. *See* PSR ¶ 67. The court indicated, however, that it would depart down from that range to account for Lora's mental health issues. A173-74.

Furthermore, the court explained that it did not feel "bound" by the plea agreement to the extent that the agreed-upon sentence would be inconsistent with its consideration of the sentencing factors in 18 U.S.C. § 3553(a). A175-76. After hearing from the parties (including Lora), the court described the factors that were most significant to its sentencing decision, including the guidelines, the seriousness of the offense conduct, Lora's criminal history and personal history, and the sentence imposed on a co-defendant. A200-205. The court returned again to its belief that the plea agreement was not binding on it to the extent it precluded the court from considering the § 3553(a) factors. A205-208. On that basis, then, the court sentenced Lora to 11 years' imprisonment. A208.

After explaining the sentence imposed, the district court dismissed Count Two of the in-

dictment (the substantive possession count) “on the basis of [the plea] agreement.” A214. The government objected, noting that because the court had rejected the agreed-upon sentence in the Rule 11(c)(1)(C) plea agreement, that agreement was “null and void.” A214. The court responded, “I don’t think that’s effective and binding on me” A214. The government moved the court to reconsider the dismissal of Count Two, A4; the court took that motion under advisement. A4, A247-57.

Both parties appealed, A4, A258-59, and in this Court, the parties filed a joint motion to vacate the judgment and remand for resentencing. A260. On April 21, 2006, this Court granted the joint motion with the following order:

IT IS HEREBY ORDERED that the motion by appellee USA to vacate the judgment entered 1/24/06, as to sentence imposed, and dismissal of count two of the indictment by the district court, and to remand for resentencing in accordance with the plea agreement executed by the parties on 9/19/05 is GRANTED.

A260.

On remand, the district court acknowledged this Court’s order, explaining that the case was back before it for the purpose of sentencing Lora “in accordance with the Plea Agreement” and the

subsequent dismissal of Count Two of the indictment. GA5. After hearing from the parties, the court imposed sentence:

[T]he prior sentence having been vacated, the prior dismissal of Count Two having been vacated by the order of the Court of Appeals, and the case being here for resentencing, I will commit the Defendant to the custody of the Attorney General, or his duly authorized representative, for a period of 15 years, as a reasonable sentence, reflective of the agreement of the parties, and the finding of the Court, as memorialized in the Plea Agreement letter on file with the Clerk.

GA16. After the court imposed this sentence in accordance with the plea agreement, the government moved to dismiss Count Two of the indictment, and the court granted that motion. GA20-21; A5.

**B. The 2008 proceedings under 18 U.S.C.
§ 3582(c)(2)**

On May 5, 2008, nearly two years after the court entered judgment sentencing Lora according to the terms of the plea agreement, the court *sua sponte* reduced Lora's sentence under 18 U.S.C. § 3582(c)(2). A5, A264. This order, which reduced Lora's sentence from 180 months' imprisonment to 168 months' imprisonment, was

based on the Sentencing Commission's 2007 decision to reduce offense levels for the cocaine base ("crack") sentencing guidelines and its subsequent decision to make those reductions retroactive. A264.

The government moved to reconsider that decision, arguing that Lora was ineligible for a sentence reduction under § 3582(c)(2) because he had been sentenced pursuant to a binding plea agreement under Rule 11(c)(1)(C), and not under the crack cocaine guidelines. A269. The district court reversed its original decision, thus reinstating Lora's 180-month sentence. A5, A272.

C. Lora's 2011 request for a sentence reduction under 18 U.S.C. § 3582(c)(2)

On October 24, 2011, Lora filed a *pro se* motion to reduce his sentence under 18 U.S.C. § 3582(c)(2). A5. Lora's lawyer filed a similar motion on November 23, 2011. A6. Both motions sought a sentence reduction based on an amendment to the Sentencing Guidelines, made retroactive in 2011, which lowered the base offense levels applicable to crack cocaine offenses. *See* A273-78.

The district court denied Lora's request for relief in an order dated August 30, 2012. A6, A285. The court noted that the Supreme Court had recently considered whether a defendant sentenced under a binding plea agreement was

eligible for a sentence reduction under § 3582(c)(2). A286 (describing *Freeman v. United States*, 131 S. Ct. 2685 (2011)). As the district court explained, under the plurality’s standard in *Freeman*, a defendant sentenced under a Rule 11(c)(1)(C) plea may be eligible for a sentence reduction “to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or approve the [plea] agreement.” A286 (quoting *Freeman*, 131 S. Ct. at 2692-93). Under Justice Sotomayor’s concurring opinion, a sentencing court may reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) binding plea “when the ‘agreement expressly use[d] a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the [Sentencing Commission].” A286-87 (quoting *Freeman*, 131 S. Ct. at 2695 (Sotomayor, J., concurring)). Applying these standards, the court found Lora ineligible for relief:

In the instant case the court concludes that Guidelines were not a “relevant part of the analytical framework,” *Freeman*, 131 S. Ct. at 2693, employed by the court in sentencing the defendant, nor were they “expressly used” for computing the defendant’s sentence, *Id* at 2695 (Sotomayor, J., concurring), the defendant’s sentence

was not “based on” the Sentencing Guidelines for purposes of § 3582(c)(2).

Reference to the defendant’s plea agreement reveals that, aside from a general affirmation of the Guidelines’ advisory applicability in every case, the agreement makes no “use [of] a Guidelines sentencing range that has subsequently been lowered by the Sentencing Commission to establish the term of imprisonment imposed by the District Court.” 131 S. Ct. at 2695 (Sotomayor, J., concurring). Rather, the instant plea agreement makes literally no use of the Guidelines aside from the general affirmation noted above. Instead, omitting any mention of the Guidelines, the agreement expressly states that “[t]he defendant and the Government . . . agree that the defendant’s guilty plea is entered pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure and that, assuming the [c]ourt accepts this plea agreement, a sentence that includes a term of imprisonment of not less than 15 years is a reasonable and appropriate disposition of this case.”

A287-88. This appeal followed.

Summary of Argument

Lora was ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) because he was sentenced based on a binding plea agreement to a 15-year term that was not tied in any way to his guidelines range. Under the framework set out by Justice Sotomayor in *Freeman v. United States*, a defendant sentenced under a binding plea agreement may be eligible for a sentence reduction if the agreed-upon sentence was tied to a guidelines range that was subsequently reduced. But where, as here, the agreed-upon sentence was not tied to a guidelines range, the defendant is ineligible for a sentence reduction.

Furthermore, putting aside Lora's binding sentencing agreement, he was sentenced as a career offender and thus the reductions in the crack cocaine guidelines did not reduce his guidelines range. Accordingly, the district court properly denied Lora's motion for a sentence reduction.

Argument

I. The district court properly denied Lora’s motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) because Lora was ineligible for such a reduction.

A. Governing law and standard of review

1. Section 3582(c)(2) and the crack guidelines

Under 18 U.S.C. § 3582(c)(2), a defendant’s sentence may be reduced when he was “sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission. . . .” Under that statute, however, a reduction is allowed only when “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *See Dillon v. United States*, 130 S. Ct. 2683, 2691-92 (2010).

Section 1B1.10 of the Guidelines identifies the amendments which may be applied retroactively, and articulates the proper procedure for implementing such an amendment in a concluded case. Section 1B1.10 provides, in relevant part:

(a) *Authority*.—

(1) *In General*.—In a case in which a defendant is serving a term of imprisonment,

and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

* * *

(b) *Determination of Reduction in Term of Imprisonment.*—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the 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.

(2) Limitation and Prohibition on Extent of Reduction.—

*(A) Limitation.—*Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

*(B) Exception for Substantial Assistance.—*If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

U.S.S.G. § 1B1.10(a)-(b).

In *Dillon*, the Supreme Court addressed the process for application of a retroactive guideline amendment, emphasizing that § 1B1.10 is binding. The Court declared: “Any reduction must be consistent with applicable policy statements is-

sued by the Sentencing Commission.” 130 S. Ct. at 2688. The Court affirmed that a two-step approach must be followed:

At step one, § 3582(c)(2) requires the court to follow the Commission’s instructions in § 1B1.10 to determine the prisoner’s eligibility for a sentence modification and the extent of the reduction authorized. Specifically, § 1B1.10(b)(1) requires the court to begin by “determin[ing] the amended guideline range that would have been applicable to the defendant” had the relevant amendment been in effect at the time of the initial sentencing. “In making such determination, the 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.” *Ibid.*

Consistent with the limited nature of § 3582(c)(2) proceedings, § 1B1.10(b)(2) also confines the extent of the reduction authorized. Courts generally may “not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) . . . to a term that is less than the minimum of the amended guideline range” produced by the substitution. § 1B1.10(b)(2)(A). . . .

At step two of the inquiry, § 3582(c)(2) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case.

Id. at 2691-92.

The amendment in question in this matter is part A of Amendment 750, which altered the offense levels in § 2D1.1 applicable to crack cocaine offenses, and which the Sentencing Commission added to § 1B1.10(c) as a retroactive amendment. The Sentencing Commission lowered these offense levels pursuant to the Fair Sentencing Act of 2010, which changed the threshold quantities of crack cocaine which trigger mandatory minimum sentences under 21 U.S.C. § 841(b), and directed the Commission to implement comparable changes in the pertinent guideline.

2. Standard of review

The denial of a motion pursuant to 18 U.S.C. § 3582(c)(2) is reviewed for abuse of discretion. *See United States v. Mock*, 612 F.3d 133, 135 (2d Cir. 2010) (per curiam). Within that inquiry, “[t]he determination of whether an original sentence was ‘based on a sentencing range that was subsequently lowered by the Sentencing Com-

mission,’ 18 U.S.C. § 3582(c)(2), is a matter of statutory interpretation and is thus reviewed *de novo*.” *United States v. Martinez*, 572 F.3d 82, 84 (2d Cir. 2009) (per curiam). *See also United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam).

B. Discussion

- 1. Lora was ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) because he was sentenced to a binding sentence of 15 years under Rule 11(c)(1)(C) that was in no way tied to the guidelines range.**

The district court properly denied Lora’s motion because his sentence did not rest on the applicable guideline range, but rather on an express stipulation in his plea agreement, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), as to the final sentence, and that stipulation was not tied to a particular guideline range.

Rule 11(c)(1)(C) authorizes the government and a defendant to enter into a plea agreement in which they “agree that a specific sentence or sentencing range is the appropriate disposition of the case.” The Rule provides that “such a recommendation or request binds the court once the court accepts the plea agreement.” Fed. R. Crim.

P. 11(c)(1)(C). Section 3582(c)(2) provides, in conjunction with Sentencing Guidelines § 1B1.10, that a defendant is eligible for a sentence reduction based on a retroactive guideline amendment if the defendant’s sentence was “based on” the subsequently amended range and the amendment had the effect of lowering that range. 18 U.S.C. § 3582(c)(2).

The issue in this case is governed by *Freeman v. United States*, 131 S. Ct. 2685 (2011), which considered whether a defendant who pleads guilty in exchange for a specific sentence pursuant to a Rule 11(c)(1)(C)—or “type C”—agreement is eligible for a § 3582(c)(2) sentence reduction. The Court reviewed the judgment of the Sixth Circuit, which had denied Freeman eligibility for a § 3582(c)(2) sentence reduction based on the 2007 amendments to the crack cocaine guideline on the ground that, barring a miscarriage of justice or mutual mistake, defendants who enter into type C agreements are never eligible for a sentence reduction. *Freeman*, 131 S. Ct. at 2690, 2692. The Court reversed the judgment of the Sixth Circuit in a splintered decision.

Four Justices concluded that a “district judge’s decision to impose a sentence may . . . be based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C),” because the district judge must consider the

Guidelines and calculate the defendant's relevant guideline range when deciding whether to accept the plea agreement. *Freeman*, 131 S. Ct. at 2690, 2692-93 (plurality). According to the plurality, "[Section] 3582 modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Id.* at 2693.

Concurring in the judgment, Justice Sotomayor agreed that *Freeman* was eligible for a sentence reduction but took a narrower view of when the sentence of a Rule 11(c)(1)(C) defendant is "based on" the Guidelines. In her view, a sentence imposed pursuant to a type C agreement generally will be "based on" the agreement itself, not the district court's guidelines calculations, because a type C agreement is binding once accepted and, "[a]t the moment of sentencing, the court simply implements the terms of the agreement it has already accepted." *Freeman*, 131 S. Ct. at 2696 (Sotomayor, J., concurring). That is so even though "the parties to a (C) agreement may have considered the Guidelines in the course of their negotiations." *Id.* at 2697; *see ibid.* (rejecting argument that courts must "engage in a free-ranging search through the parties' negotiating history in search of a Guide-

lines sentencing range that might have been relevant to the agreement or the court’s acceptance of it”). Justice Sotomayor, however, concluded that “if a (C) agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is ‘based on’ the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2).” *Id.* at 2695; *accord id.* at 2697-98. In finding that standard met in Freeman’s case, Justice Sotomayor noted that the agreement stated that Freeman “agrees to have his sentence determined pursuant to the Sentencing Guidelines.” *Id.* at 2699. Justice Sotomayor went on to infer that the 106-month sentence specified by the agreement reflected the “bottom end” of the guideline range anticipated by the parties; the agreement calculated an offense level of 19 and anticipated a category IV criminal history, and those calculations yielded a guideline range of 46 to 57 months—or 106 to 117 months after adding the mandatory 60 months from a § 924(c) charge. *Id.* at 2699-2700.

In dissent, four Justices concluded that a defendant who pleads guilty in exchange for a specific sentence pursuant to a type C agreement is not eligible for a sentence reduction because the defendant’s sentence is always “based on” the

agreement. *Freeman*, 131 S. Ct. at 2700-01 (Roberts, C.J., dissenting).

Justice Sotomayor's concurrence in *Freeman* sets forth the controlling standard on when a Rule 11(c)(1)(C) defendant who pleads guilty in exchange for a specific sentence is eligible for a § 3582(c)(2) sentence reduction. The general rule for ascertaining the holding of a case in which there is no majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); *United States v. James*, ___ F.3d ___, 2013 WL 1235642, *11 (2d Cir. Mar. 28, 2013) ("Ordinarily, '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those members who concurred in the judgments on the narrowest grounds.'") (quoting *Marks*, 430 U.S. at 193).

In *Freeman*, Justice Sotomayor took a narrower view than the plurality of when a Rule 11(c)(1)(C) defendant is eligible for a sentence reduction. The plurality would find § 3582(c)(2) eligibility "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the

sentence or to approve the agreement,” *Freeman*, 131 S. Ct. at 2692-93 (plurality opinion), but Justice Sotomayor would find eligibility only where the plea agreement tied the recommended sentence to the guideline range in express terms, *id.* at 2695 (Sotomayor, J., concurring). To be sure, the plurality and concurrence differ in their focus: the plurality focuses on what the district court used to approve the agreement or sentence the defendant whereas Justice Sotomayor focuses on what the agreement used to determine the stipulated sentence. But it is difficult to conceive of a scenario in which the plurality would conclude that the district court had not used the guideline range in question to approve the agreement or to sentence the defendant where, under Justice Sotomayor’s standard, the agreement itself “expressly use[d]” (*ibid.*) that range to arrive at the stipulated sentence.

The concurrence, therefore, should be regarded as narrower than the plurality opinion and to represent the controlling standard for § 3582(c)(2) eligibility in cases involving a type C agreement that calls for a specific sentence. Indeed, the Chief Justice acknowledged in dissent that Justice Sotomayor’s standard would be the one applied by courts going forward. *See Freeman*, 131 S. Ct. at 2704 (Roberts, C.J., dissenting). With one exception, every appellate court to consider the issue has agreed. *See, e.g., United*

States v. Rivera-Martinez, 665 F.3d 344, 346-48 (1st Cir. 2011), *cert. denied*, 133 S. Ct. 212 (2012); *United States v. Thompson*, 682 F.3d 285, 289-90 (3d Cir. 2012); *United States v. Brown*, 653 F.3d 337, 340 & n.1 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1003 (2012); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011); *United States v. Dixon*, 687 F.3d 356, 359-60 (7th Cir. 2012); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012), *cert. denied*, ___ S. Ct. ___, 2013 WL 529691 (Mar. 18, 2013); *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013). *Contra United States v. Epps*, 707 F.3d 337, 348-52 (D.C. Cir. 2013) (finding that there is no controlling approach in *Freeman* and determining to apply the plurality's opinion; stating that under that approach the assessment whether the guideline range was pertinent should be based on the reasons given by the district court for accepting the sentence that it ultimately imposed, not on the parties' agreement).

In this case, Lora's sentence was based on the sentence agreed upon in his plea agreement, and that sentence, in turn, was *not* based on his Guidelines range. Indeed, there is no evidence in the plea agreement that the parties used Lora's guidelines range to set the agreed-upon term of imprisonment. Unlike the plea agreement in *Freeman* where the parties calculated Freeman's guidelines range and then agreed to a sentence

at the bottom of that range, *see Freeman*, 131 S. Ct. at 2691, the parties here did not even calculate Lora's range in the plea agreement. They merely agreed that a sentence of not less than 15 years was reasonable and appropriate. A13. Thus, under the standards established by the Supreme Court in *Freeman*, Lora is ineligible for a sentence reduction.

This conclusion is also consistent with this Court's decision in *United States v. Main*, 579 F.3d 200 (2d Cir. 2009), a case cited by Justice Sotomayor as consistent with her approach. *See Freeman*, 131 S. Ct. at 2698 n.3 (Sotomayor, J., concurring). In *Main*, the defendant pleaded guilty pursuant to a plea agreement under Rule 11(c)(1)(C) that specified that he would be sentenced to not more than 96 months' imprisonment. 579 F.3d at 202. That sentence was below the defendant's then-applicable guidelines range, and this Court held that because the district court sentenced the defendant to a term specified by the agreement, instead of to a term based on the guidelines range, the defendant was ineligible for a sentence reduction under § 3582(c)(2). *Id.* at 203. Here, as in *Main*, the parties agreed to a stipulated sentence that was below, but not tied to, the defendant's guidelines range. And thus here, as in *Main*, the defendant is ineligible for a sentence reduction. *See also United States v. Scott*, __ F.3d __, 2013 WL

1274531, *2 (7th Cir. Mar. 29, 2013) (defendant sentenced under type C plea ineligible for sentence reduction where the parties never identified a guideline range or suggested that the agreed-upon sentence was based on a range).

And even if this Court were to examine the district court's reasons for accepting the plea agreement and sentencing Lora to the agreed-upon 15 years, *see Epps*, 707 F.3d at 351, there is no indication that the court considered the guidelines at all. Indeed, when the court accepted the plea agreement and imposed sentence, it did so purely to give effect to the parties' agreement. *See* GA5, GA16. At no point were the guidelines even "a relevant part of the analytical framework," used by the court to sentence Lora.

Lora raises two counter-arguments, but neither is persuasive. *First*, Lora mis-reads the government's position as arguing that *all* defendants who plead guilty under type C plea agreements are ineligible for sentence reductions under § 3582(c)(2). Appellant's Br. at 16-18. As set forth above, however, after *Freeman*, that is not the law. In *Freeman* itself, for example, the defendant was eligible for a sentence reduction because his type C agreement calculated his guideline range and set the agreed-upon sentence at the bottom of that range. 131 S. Ct. at 2699 (Sotomayor, J., concurring). But where, as here, a defendant is sentenced under a type C agree-

ment where the agreed-upon sentence was not tied to the recommended guidelines range, the defendant will be ineligible for relief.

Second, Lora argues that his type C agreement should not be read as an implied waiver of his right to future retroactive sentence reductions. Appellant’s Br. at 18. Besides general exhortations against “implied waivers,” however, Lora provides no real argument to support this point. And this Court has had little trouble upholding such an “implied waiver” in an analogous context. In particular, this Court has upheld appeal waivers that operate to waive a defendant’s right to benefit from subsequent favorable changes in the law. *See United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005) (upholding waiver against *Booker* claim, and noting that “the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements”).

That is all Lora’s plea agreement did here: Lora agreed to a 15-year sentence—that was not tied to the guidelines—and thereby gave up the right to seek a subsequent sentence reduction under § 3582(c)(2). Although Lora may regret that decision now, he received valuable consideration for that deal when he entered into his plea agreement: the government agreed to forgo filing informations under 21 U.S.C. § 851 that would have subjected him to a mandatory life

sentence. Having taken a set 15-year sentence to avoid a mandatory life sentence in 2005, he should not be heard to complain now that he cannot take advantage of the Sentencing Commission's 2011 decision to reduce the offense levels for crack guidelines.

2. Alternatively, even if Lora's type C plea did not preclude a sentence reduction here, he would still be ineligible for a sentence reduction because he was found to be a career offender.

Even if Lora's type C agreement did not preclude a sentence reduction under § 3582(c)(2), he would still be ineligible for that relief because his guidelines were calculated under the career offender guideline and not the crack guideline. In other words, the district court properly denied Lora's motion for a sentence reduction because the amendment to the crack guidelines did not have the effect of lowering Lora's guidelines range.

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant's sentence may only be reduced when he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Further, under the statute, a reduction is allowed only when "such a reduction is consistent with

the applicable policy statements issued by the Sentencing Commission.” *See Dillon*, 130 S. Ct. at 2691 92. In § 1B1.10, the Commission, consistent with the statutory directive that a reduction should occur only where the defendant’s sentencing range was lowered, makes clear that a sentencing court is not authorized to reduce a defendant’s sentence when a retroactive amendment does not result in lowering the applicable sentencing range for the defendant. Specifically, subsection (a)(2)(B) states: “A reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant’s applicable guideline range.” U.S.S.G. § 1B1.10(a)(2)(B).

Courts also agree that where, as is the case here, application of the pertinent amendment does not result in a different sentencing range, no reduction of sentence may occur. *See United States v. Lindsey*, 556 F.3d 238 (4th Cir. 2009) (finding that, although a defendant’s offense level (prior to a departure) was 41, and is now 39, he was not entitled to relief because the sentencing range of 360 months to life remained unchanged); *United States v. McFadden*, 523 F.3d 839 (8th Cir. 2008) (per curiam); *United States v. Leniear*, 574 F.3d 668, 673-74 (9th Cir. 2009)

(the final sentencing range was unchanged due to the operation of the grouping rules); *United States v. Sharkey*, 543 F.3d 1236, 1239 (10th Cir. 2008).

In this case, Lora's sentencing range was not changed by the amendment because it did not rest on the provision regarding crack cocaine in § 2D1.1 which was amended. Under the version of § 2D1.1 in effect at the time of sentencing, Lora's base offense level for the crack offense was 36; that would be reduced to 32 pursuant to Amendment 750, part A. However, because Lora was found to be a career offender, based on his prior convictions for other drug trafficking offenses, his base offense level was increased to 38 pursuant to § 4B1.1.² That enhancement was

² As noted above, although the court set his guideline range using level 38, the career offender level should have been 37. This error has no bearing on this appeal however. *First*, as explained in the text at pages 32-36, a proceeding under § 3582(c)(2) is not a vehicle for correcting alleged errors made at sentencing, regardless of the merit of the argument. *Second*, even if this Court were to "correct" the guideline calculation based on this newly-discovered error, this correction would not support a sentence reduction under § 3582(c)(2), which only allows reductions

unaffected by the recent guideline amendment, and Lora's offense level remains exactly what it was at the time of sentencing. Section 1B1.10 directs: "the 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." U.S.S.G. § 1B1.10(b)(1). Accordingly, Lora may not receive any relief under § 1B1.10.

All circuits have addressed the career offender scenario with regard to a retroactive amendment to the crack guideline, and all are unanimous that relief is unavailable. *See United States v. Caraballo*, 552 F.3d 6, 10 (1st Cir. 2008); *United States v. Mock*, 612 F.3d 133, 138 (2d Cir. 2010) (per curiam); *United States v. Mateo*, 560 F.3d 152, 154-55 (3d Cir. 2009); *United States v. Munn*, 595 F.3d 183, 187 (4th Cir. 2010); *United States v. Anderson*, 591 F.3d 789, 791 (5th Cir. 2009); *United States v. Perdue*, 572 F.3d 288, 292-93 (6th Cir. 2009); *United States v. Forman*, 553 F.3d 585, 589 (7th Cir. 2009) (per curiam); *United States v. Tingle*, 524 F.3d 839 (8th Cir. 2008) (per curiam); *United States v. Wesson*, 583 F.3d 728, 731 (9th Cir.

when a change in a sentencing guideline results in a reduced range.

2009); *United States v. Sharkey*, 543 F.3d 1236, 1239 (10th Cir. 2008); *United States v. Moore*, 541 F.3d 1323, 1327-30 (11th Cir. 2008); *United States v. Berry*, 618 F.3d 13, 17-18 (D.C. Cir. 2010).

Accordingly, Lora, who was sentenced under the career offender guideline, is not entitled to a sentencing reduction based on the reduced crack cocaine guidelines.

Furthermore, Lora is ineligible despite the fact that the district court, at the original sentencing proceeding, departed below the career offender guideline. The revised § 1B1.10, effective November 1, 2011, establishes that in determining whether a defendant's applicable guidelines range was reduced by a guideline amendment, the relevant "applicable guideline range" is the range "determined before consideration of any departure provision in the Guidelines Manual or any variance." See U.S.S.G. § 1B1.10, note 1(A).

Finally, although Lora suggests that he should not be considered a career offender based on case law that developed subsequent to his sentencing, *see* Appellant's Br. at 12 n.1, this argument is not properly raised in a proceeding under § 3582(c)(2).

As noted above, § 3582(c)(2) permits a sentencing court to reduce a defendant's sentence

only when “such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission.” In its applicable policy statement, the Sentencing Commission explicitly directs that “[i]n determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the 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” (emphasis added).

In *Dillon*, the Supreme Court held that the limitation imposed by the Sentencing Commission must be respected. There, the defendant, besides seeking application of the revised crack guideline, contended that the district court had miscalculated the criminal history category. See Brief for Petitioner in *Dillon*. The Supreme Court stated:

§ 3582(c)(2) does not authorize a resentencing. Instead, it permits a sentence reduction within the narrow bounds established by the Commission. The relevant policy statement instructs that a court proceeding under § 3582(c)(2) “shall substitute” the amended Guidelines range for the initial range “and shall leave all other

guideline application decisions unaffected.” § 1B1.10(b)(1). Because the aspects of his sentence that Dillon seeks to correct were not affected by the Commission’s amendment to § 2D1.1, they are outside the scope of the proceeding authorized by § 3582(c)(2), and the District Court properly declined to address them.

Dillon, 130 S. Ct. at 2694.

The power afforded in § 3582(c)(2) is limited, and that limit must be respected. *See Braxton v. United States*, 500 U.S. 344, 348 (1991) (“In addition to the duty to review and revise the Guidelines, Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u). This power has been implemented in Section 1B1.10, which sets forth the amendments that justify sentence reduction.”) (emphasis in original). The Third Circuit explained:

It is, thus, clear that only the retroactive amendment is to be considered at a resentencing under § 3582 and the applicability of that retroactive amendment must be determined in light of the circumstances existent at the time sentence was originally imposed. In other words, the retroactive amendment merely replaces

the provision it amended and, thereafter, the Guidelines in effect at the time of the original sentence are applied.

United States v. McBride, 283 F.3d 612, 615 (3d Cir. 2002). *McBride* rejected an effort to invoke the new constitutional rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (that any fact which increases a statutory maximum sentence must be proven to a jury beyond a reasonable doubt), through the filing of a § 3582(c)(2) motion, given that *Apprendi* did not represent an action of the Sentencing Commission lowering a guideline range. *McBride* held that, consistent with the limited relief afforded by §§ 3582(c)(2) and 1B1.10, the district court could impose a sentence within a reduced guideline range regardless of whether that sentence violated *Apprendi*. *McBride*, 283 F.3d at 615-16.

This Court, too, has held that a district court may not reconsider other portions of a defendant's sentence in the context of a § 3582(c)(2) proceeding. In *United States v. Mock*, 612 F.3d 133, 135-36 (2d Cir. 2010) (per curiam), the defendant argued that he was erroneously sentenced as a career offender at his original sentencing hearing and thus that the district court erroneously relied on his career offender status to deny him a sentence reduction under the newly retroactive amendments to the crack cocaine guidelines. This Court rejected the defendant's

argument, explaining that “because § 3582(c)(2) ‘does not authorize a sentencing or resentencing proceeding,’ a defendant may not seek to attribute error to the original, otherwise-final sentence in a motion under that provision.” *Id.* at 137 (quoting *Dillon*, 130 S. Ct. at 2690) (internal citations omitted). In other words, “regardless of whether there is merit to defendant’s argument that the district court committed procedural error when it applied the career offender Guideline at his original sentencing, neither the district court, nor [the Second Circuit], is authorized to consider that contention in the context of a motion pursuant to 18 U.S.C. § 3582(c)(2).” *Id.* at 138.

Here, just as in *Mock*, Lora argues that he was erroneously sentenced as a career offender. But just as in *Mock*, regardless of whether there is any merit to Lora’s argument that he was improperly sentenced as a career offender, that claim is not properly presented in a proceeding under § 3582(c)(2). Accordingly, Lora’s claim that he was improperly sentenced as a career offender should be denied.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: April 12, 2013

Respectfully submitted,

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A handwritten signature in cursive script, reading "Sandra S. Glover".

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,450 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



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Addendum

18 U.S.C. § 3582(c)(2):

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

* * *

(2) 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 or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

United States Sentencing Guideline § 1B1.10.
Reduction in Term of Imprisonment as a Result
of Amended Guideline Range (Policy Statement)

(a) Authority.--

(1) In General.--In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. 3582(c)(2). As required by 18 U.S.C. 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.--A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. 3582(c)(2) if--

(A) None of the amendments listed in subsection (c) is applicable to the defendant; or

(B) An amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.--Consistent with subsection (b), proceedings under 18 U.S.C. 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.--In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the 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.

(2) Limitation and Prohibition on Extent of Reduction.--

(A) Limitation.--Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception for Substantial Assistance.--If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a

government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. **(C) Prohibition.**--In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Covered Amendments.--Amendments covered by this policy statement are listed in Appendix C as follows: 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, 706 as amended by 711, 715, and 750 (parts A and C only).

Application Notes:

1. Application of Subsection (a).--

(A) Eligibility.--Eligibility for consideration under 18 U.S.C. 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. 3582(c)(2) and is not consistent with this policy statement if: (i) None of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the defend-

ant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment) (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) Whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) Whether a reduction in the defendant's term

of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) The guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range

determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a

government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Application to Amendment 750 (Parts A and C Only).--As specified in subsection (c), the

parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in 2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to § 2D1.1 (see § 2D1.1, comment. (n.8)). Part C deleted the cross reference in 2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under 2D1.1.>

5. Supervised Release.--

(A) Exclusion Relating to Revocation.--Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.--If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range deter-

mined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

6. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant’s term of imprisonment as provided by 18 U.S.C. 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, 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 pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. 3582(c)(2) and implements 28 U.S.C. 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. *See Dillon v. United States*, 130 S. Ct. 2683 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants.

The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. 994(u) (formerly section 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).