Plea Bargaining, Sentence Modifications, and the Real World

Julian A. Cook
University of Georgia School of Law, cookju@uga.edu

Repository Citation
Julian A. Cook, Plea Bargaining, Sentence Modifications, and the Real World, 48 Wake Forest L. Rev. 65 (2013), Available at: https://digitalcommons.law.uga.edu/fac_artchop/918
PLEA BARGAINING, SENTENCE MODIFICATIONS, AND THE REAL WORLD

Julian A. Cook, III*

On June 23, 2011, the Supreme Court rendered its judgment in the case of Freeman v. United States.1 Ignored largely, if not entirely, by the greater media outlets, the little-noticed Freeman decision is potentially more transformative than some of the Court’s higher-profiled Fourth and Fifth Amendment decisions rendered in recent years.2 Specifically, Freeman addressed “whether defendants who enter into plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief” if the guideline range applicable to the underlying criminal offense has subsequently been lowered.3 In general, once a defendant is sentenced, he is ineligible for later modification of that sentence.4 However, 18 U.S.C. § 3582 sets forth certain exceptions to this rule.5 One such exception is found in subsection (c)(2), which allows for modification in instances where a defendant has been imprisoned “based on” a federal sentencing guideline range that has since been lowered.6

* J. Alton Hosch Professor of Law, University of Georgia School of Law. A.B. Duke University; M.P.A. Columbia University; J.D. University of Virginia. I would like to thank Kent Barnett, Dan Coenen, Kim Forde-Mazrui, and Frank Heft for their helpful comments during the preparation of this Article. I would also like to thank University of Georgia School of Law students Jennifer Case, Adrienne Moore, and Brendan White for their excellent research assistance.

2. See generally Howes v. Fields, 132 S. Ct. 1181 (2012) (holding that an inmate who was interrogated by law enforcement officers in a conference room within a prison was not in custody for purposes of Miranda); United States v. Jones, 132 S. Ct. 945 (2012) (finding only that the placement of a Global-Positioning-System device on a vehicle for the purpose of obtaining information constitutes a search); City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (concluding that a government employer’s search of an employee’s government-issued pager was reasonable).
3. Freeman, 131 S. Ct. at 2690.
4. 18 U.S.C. § 3582(b) (2006); Freeman, 131 S. Ct. at 2696–97 (Sotomayor, J., concurring).
5. 18 U.S.C. § 3582(c).
6. 18 U.S.C. § 3582(c)(2) provides in pertinent part: (c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—
In 2007, the United States Sentencing Commission (the “Commission”) amended the U.S. Sentencing Guidelines (the “Guidelines”) in an effort to alleviate the longstanding and severe penalty disparity between cocaine base (“crack cocaine”) and cocaine hydrochloride (“cocaine powder”) trafficking offenses.\(^7\) Sentencing

\(\text{\ldots} \)

\((2)\) 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 \ldots 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.

18 U.S.C. § 3582(c)(2). In addition, section 1B1.10 of the Guidelines provides, in pertinent part:

\text{Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)}

\text{(a) Authority —}

\(1\) \text{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.}

\(\text{\ldots} \)

\(\text{(b) Determination of Reduction in Term of Imprisonment. —}

\(1\) \text{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.}

U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 (2011).

7. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 706. In 2010, Congress enacted the Fair Sentencing Act, which increased the minimum quantities necessary to trigger minimum mandatory penalties for crack cocaine trafficking offenses. Fair Sentencing Act of 2010, Pub. L. No. 111-120, 124 Stat. 2372 (codified in scattered sections of 21 U.S.C.). Under the Act, a five-year minimum sentence now requires twenty-eight grams (up from the previous five grams), and a ten-year minimum now requires 280 grams (up from fifty grams). Id. § 2. The Act also instructed the Commission to revise its guidelines “as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.” Id. § 8(2). In response, the Commission issued an emergency set of guideline revisions that became effective in November 2010.
under the federal sentencing scheme requires a determination of a particular crime's base offense level and an evaluation of a defendant's criminal history.\(^8\) Each category is assigned a particular score. In the context of narcotics trafficking crimes, the corresponding base offense level is determined by the type and weight of the drug involved.\(^9\) Since the enactment of the Anti-Drug Abuse Act of 1986,\(^10\) which assigned minimum mandatory penalties for certain narcotic offenses (including crimes involving crack cocaine and cocaine powder), the Commission followed Congress's lead and established guidelines that conformed with the Act. The Commission equated trafficking crimes involving one gram of crack cocaine with 100 grams of cocaine powder.\(^11\) This meant that an individual who distributed a gram of crack cocaine would have had to distribute 100 grams of cocaine powder to be assigned the same base offense level.

After much debate and criticism, the Commission responded in 2007 by lessening the disparity between the two drugs.\(^12\) Specifically, the Commission lowered by two levels the base offense levels assigned to each crack cocaine quantity.\(^13\) In 2008, the Commission made the guideline amendments retroactive, thereby permitting individuals previously sentenced under the old Guidelines to seek a new sentence in accordance with the revised sentencing table.\(^14\)

Whether Freeman's sentence was "based on" the Guidelines or strictly upon the plea agreement was the central focus of the case.

---

8. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.
9. Id. § 2D1.1(c).
10. Anti-Drug Abuse Act (ADAA) of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified in scattered chapters of U.S.C. and FED. R. CRIM. P. 35). Under the Act, a five-year minimum mandatory penalty would attach to a first-time offender whose trafficking offense involved a minimum of five grams of crack cocaine. A ten-year minimum mandatory penalty would be triggered in the event such an individual trafficked in at least fifty grams of crack cocaine. For these same minimums to attach in the cocaine powder context, an offender would have to traffic in a minimum of 500 grams (five-year minimum) and 5000 grams (ten-year minimum). See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 706.
12. U.S. SENTENCING GUIDELINES MANUAL app. C., amend. 706; see also Dillon, 130 S. Ct. at 2688.
14. U.S. SENTENCING GUIDELINES MANUAL app. C; amend. 713; see also Dillon, 130 S. Ct. at 2688.
Freeman argued the former position, contending that, since the original guideline range applicable to his underlying narcotics charge (possession with intent to distribute crack cocaine) of forty-six to fifty-seven months had been reduced to thirty-seven to forty-six months, he was eligible to seek a sentence reduction. He insisted that Congress intended for defendants in his position, irrespective of the nature of the underlying plea agreement, to be eligible for relief under the section. Conversely, the government insisted that sentences imposed pursuant to plea agreements that bind the court to a specific sentence are based not upon a guideline range but upon the agreement itself. The government maintained that, in the binding plea context, the court is not considering a range of sentences but instead is simply implementing the agreed upon sentencing term contained in the agreement.

In a five-to-four decision, the Court found for Freeman, concluding that he was eligible to seek a sentence reduction. And while the end result certainly divided the Court and was no doubt good news for Freeman, it was the concurring opinion of Justice Sotomayor (who provided the critical fifth vote and a narrower basis for her judgment) that was controlling and may ultimately prove to be problematic for defendants and the Commission in years to come. It is an opinion that straddles the fence between the competing views of Justice Kennedy (joined by Kagan, Breyer, and Ginsburg), who announced the judgment of the Court and expressed the view that sentences imposed pursuant to binding agreements are always eligible for later modifications, and Chief Justice Roberts (joined by Alito, Scalia, and Thomas), who, in dissent, opined that such sentences fall outside the purview of § 3582. While concurring in the result reached by Kennedy, Sotomayor agreed with much of the reasoning penned by Roberts.

Sotomayor's break with the dissent was contractual in nature. Though she agreed with Roberts that sentences imposed pursuant to binding plea agreements do not constitute Guidelines sentences for purposes of § 3582, she insisted that this is merely a general

---

15. Freeman v. United States, 131 S. Ct. 2685, 2691–92 (2011). Freeman was sentenced to 106 months for possession with intent to distribute crack cocaine and possession of a firearm in furtherance of a drug trafficking crime. The guideline range referenced above was applicable to the narcotics charge. He received an additional sixty months as a minimum mandatory sentence for the firearm conviction, which was not at issue in Freeman. Id.
17. Freeman, 131 S. Ct. at 2693.
18. Id. at 2696 (Sotomayor, J., concurring).
19. Id. at 2690 (plurality opinion).
20. Id. at 2692–93.
21. Id. at 2701 (Roberts, C.J., dissenting).
principle that can be pierced by a plea agreement’s plain language.\textsuperscript{22} Thus, where the plea agreement expressly declares the opposite—that the binding sentence was the product of a guideline calculus—then this language trumps the general rule and allows for § 3582 relief.\textsuperscript{23} And since Freeman’s plea agreement reflected that the Guidelines were considered, Sotomayor concluded that he was eligible for relief under the section.\textsuperscript{24} Sotomayor also issued a statement, in dicta, that, if acted upon, could produce unfortunate, long-term ramifications for criminal defendants generally and for the Commission and its efforts at rectifying sentencing inequities. For prosecutors interested in bypassing such an outcome in future cases, Sotomayor flagged a remedy: incorporate language in the plea agreement that expressly declares that the defendant agrees to waive his right to seek further sentence reductions.\textsuperscript{25}

The primary purposes underlying this Article are twofold. First, it will explain why the Freeman Court, despite reaching the correct end result, erred in its analytical approach. In so doing, the Article will illuminate the real world of plea bargaining in the Freeman context and explain why this plea negotiation truism provides a sounder, firmer, and clearer foundation to decide not only Freeman-type cases but any such case seeking § 3582 relief. In addition, this Article will use the Freeman decision to highlight and correct a common misunderstanding about the nature of plea agreement contracts. It will describe how plea agreement contracts have traditionally—and erroneously—been construed by the courts and others as unilateral arrangements between the prosecution and the defendant. As will be explained, however, plea agreements should properly be construed as bilateral contracts involving three parties—the prosecution, the defendant, and the court. And when viewed in this light, the appropriate resolution in Freeman and other cases involving § 3582 relief becomes clearer.

Second, this Article will focus upon Sotomayor’s seemingly innocent suggestion, in dicta, that prosecutors can preempt future § 3582 petitions through the inclusion of waiver clauses. The significance of her statement should not be casually dismissed or overlooked. This Article will explain why waivers of this type are likely to be considered constitutionally legitimate and why, if formally adopted by the Department of Justice, the standard inclusion of § 3582 waivers in plea agreements will not only serve to undercut defendant interests generally but will also considerably undermine the effectiveness of the Guidelines. In proving this latter point, the Article will counter Kennedy’s declaration regarding the supposed infrequency of retroactive amendments with historical

\begin{itemize}
  \item \textsuperscript{22} Id. at 2695–98 (Sotomayor, J., concurring).
  \item \textsuperscript{23} Id. at 2697–98.
  \item \textsuperscript{24} Id. at 2699–2700.
  \item \textsuperscript{25} Id. at 2699.
\end{itemize}
references to the Commission’s numerous efforts at successful
guideline reform that produced more fair and equitable sentencing
outcomes.

Part I of this Article will provide a foundational review. Specifically, it will
review the underlying facts in Freeman as well as the three opinions
authored by Justice Kennedy, Justice Sotomayor, and Chief Justice
Roberts, respectively. Part II will discuss the real world of plea
bargaining in the context presented in Freeman, as well as the
contractual argument outlined above. Finally, Part III will examine
Justice Sotomayor’s suggestion in dicta regarding the inclusion of § 3582
waiver provisions and the adverse ramifications that would necessarily
follow in the event of widespread adoption of such a policy at the
federal level.

I. FOUNDATIONAL BACKGROUND

A. Freeman v. United States: Factual Overview

On April 18, 2005, William Freeman entered a guilty plea to the
indictment returned in his case charging him with, inter alia,
possession with intent to distribute crack cocaine. He entered a
binding guilty plea (sometimes referred to as a “type C” plea)
pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal
Procedure, which provides, in pertinent part:

(c) PLEA AGREEMENT PROCEDURE.

(1) In General. An attorney for the government and the
defendant’s attorney, or the defendant when proceeding pro se,
may discuss and reach a plea agreement. . . . If the defendant
pleads guilty or nolo contendere to either a charged offense or
a lesser or related offense, the plea agreement may specify
that an attorney for the government will:

. . . .

(C) agree that a specific sentence or sentencing range is the
appropriate disposition of the case, or that a particular
 provision of the Sentencing Guidelines, or policy statement, or
sentencing factor does or does not apply (such a
recommendation or request binds the court once the court
accepts the plea agreement).

The specific sentence agreed upon was 106 months. Sixty of
the months came by virtue of a mandatory minimum sentence

26. See generally, Court Order for Change of Plea, United States v.
Freeman, No. 3:04CR00098 (W.D. Ky. Apr. 18, 2005).
27. FED. R. CRIM. P. 11(c)(1)(C).
28. Freeman, 131 S. Ct. at 2691.
attributable to Freeman's guilty plea to the charge of possession of a firearm during and in furtherance of a drug-trafficking crime. The plea to that charge was not the subject of Freeman's appeal. The remaining forty-six months were attributable to the charge that was the subject of his appeal—his guilty plea to the aforementioned crack cocaine offense. The plea agreement stated that it was the expectation of the parties that, for the narcotics offense, Freeman had a guideline range of forty-six to fifty-seven months based upon a base offense level of nineteen and Category IV criminal history category. The district court accepted the proposed binding plea agreement and sentenced Freeman to the 106-month term.

The guideline range attributable to the crack cocaine offense was modified by the Commission three years after Freeman's guilty plea. As a result, the range applicable to Freeman's offense was lowered from forty-six to fifty-seven months to thirty-seven to forty-six months. Freeman, in turn, moved for a sentence modification pursuant to § 3582(c)(2). The district court denied Freeman's request, and this result was upheld by the Sixth Circuit.

B. Freeman v. United States: The Supreme Court's Decision

1. The Opinion of Justice Kennedy

By a five-to-four vote, the Supreme Court reversed the Sixth Circuit's decision. Justice Kennedy, who announced the Court's judgment and wrote on behalf of Justices Ginsburg, Kagan, and Breyer, concluded "that the district court has authority to entertain § 3582(c)(2) motions when sentences are imposed in light of the Guidelines, even if the defendant enters into [a type C] agreement." In support, he cited federal statutory law that mandates, without limiting language as to plea type, that a court consider the Guidelines, among other factors, when imposing a sentence. He added, inter alia, that the commentary to section

29. Id.
30. Id. at 2699–2700 (Sotomayor, J., concurring).
31. Id. at 2699.
32. Id. at 2691 (plurality opinion).
33. Id.
34. Id.
35. Id. at 2692.
36. Id.
37. Id. at 2688.
39. The commentary to section 6B1.2 of the Guidelines provides, in pertinent part:

Similarly, the court should accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence
6B1.2 of the Guidelines requires that district courts "give due consideration to the relevant sentencing range, even if the defendant and prosecutor recommend a specific sentence as a condition of the guilty plea." Kennedy then referenced Freeman's sentencing hearing, declaring that it also revealed that the Guidelines underlay the court's sentence. He noted that the court had "calculated the sentencing range" and had "explained that it 'considered the advisory Guidelines and 18 USC 3553(a)[sic],' and that 'the sentence imposed . . . fall[s] within the guideline range and [is] sufficient to meet the objectives of the law.'" Kennedy added that any concerns attendant to granting district courts the authority to impose sentences in the circumstances presented in Freeman are "overstated." Citing a 2009 Tulsa Law Review article, he claimed that the issue presented will rarely arise given the infrequent occurrence of retroactive guideline amendments. Moreover, he added, § 3582 imposes meaningful restrictions upon a district court. He noted that the statute does not mandate that a district court impose a reduced sentence merely because the applicable guideline range has been modified:

If the district court, based on its experience and informed judgment, concludes the agreement led to a more lenient sentence than would otherwise have been imposed, it can deny the motion, for the statute permits but does not require the court to reduce a sentence. This discretion ensures that § 3582(c)(2) does not produce a windfall.

U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (2010).

40. Section 6B1.2(c) of the Guidelines provides:
   In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that:
   (1) the agreed sentence is within the applicable guideline range; or
   (2) (A) the agreed sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order.

Id. § 6B1.2(c).

41. Freeman, 131 S. Ct. at 2692.
42. Id. at 2693.
43. Id. (alteration in original).
44. Id.
46. Id. at 2694.
Kennedy noted, however, that, should the court elect to lower a sentence, it may alter only the guideline determination affected by the Commission’s amendment.\textsuperscript{47} No other preamendment guideline conclusion may be revisited. And even a district court’s resentencing determination is subject to appellate review.

Finally, Kennedy briefly addressed Sotomayor’s concurrence. Describing it as an “intermediate position,” he noted her view that § 3582 relief should generally be unavailable to defendants who are sentenced pursuant to binding plea agreements, unless the verbiage within the plea agreement indicates that the Guidelines were considered.\textsuperscript{48} Kennedy countered, however, that § 3582 requires an inquiry not into the reasons that motivated the plea agreement but into the reasons underlying the court’s sentence.\textsuperscript{49}

He further noted the “significant” consequences attendant to Sotomayor’s approach.\textsuperscript{50} Arguing that the underlying aim of the Guidelines to reduce sentencing disparities would be undercut, Kennedy stated:

The Act aims to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences. Section 3582(c)(2) contributes to that goal by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes are too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act’s purposes.

The crack-cocaine range here is a prime example of an unwarranted disparity that § 3582(c)(2) is designed to cure. The Commission amended the crack-cocaine Guidelines to effect a “partial remedy” for the “urgent and compelling” problem of crack-cocaine sentences, which, the Commission concluded, “significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.” The Commission determined that those Guidelines were flawed, and therefore that sentences that relied on them ought to be reexamined. There is no good reason to extend the benefit of the Commission’s judgment only to an arbitrary subset of defendants whose agreed sentences were accepted in light of a since-rejected Guidelines range based on whether their plea agreements refer to the Guidelines. Congress enacted § 3582(c)(2) to remedy systemic injustice, and the approach

\textsuperscript{47} If the original sentence was a downward departure, a district court is allowed greater flexibility in sentencing under § 3582.

\textsuperscript{48} \textit{Freeman}, 131 S. Ct. at 2694.

\textsuperscript{49} \textit{Id}.

\textsuperscript{50} \textit{Id}.
outlined in the opinion concurring in the judgment would undercut a systemic solution.\textsuperscript{51}

2. The Concurrence of Justice Sotomayor

As noted, Justice Sotomayor concurred in the result but digressed with respect to the underlying rationale. Since her opinion provided the narrowest basis upon which the plurality of Justices could agree, her concurrence is controlling.

She agreed with the dissent that, in general, sentences imposed pursuant to binding plea agreements are based not upon the Guidelines but upon the agreement.\textsuperscript{52} However, she concluded "that if a (C) agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment," then a defendant can avail himself of § 3582(c)(2) relief in the event that range is subsequently modified by the Commission.\textsuperscript{53} Such a sentence, according to Sotomayor, is "based on" the guideline range.\textsuperscript{54}

She reasoned that with type C agreements, a court is not undertaking an "independent calculation of the Guidelines or consideration of the other 18 U.S.C. § 3553(a) factors."\textsuperscript{55} Instead, the court must decide simply whether or not to accept the proposed plea agreement and its accompanying sentencing term.\textsuperscript{56} Thus, the "foundation" for the sentence is the agreement itself. She acknowledged that courts ordinarily enjoy significant discretion when imposing a sentence.\textsuperscript{57} However, in the context of binding pleas, it is the sentencing term within the accepted plea agreement that determines the sentence. Sotomayor added that to allow § 3582 relief in this context simply because a district court considered the Guidelines when determining whether to accept the binding plea proposal would enable courts to "rewrite" type C agreements in ways not contemplated by the litigants.\textsuperscript{58}

Sotomayor also rejected the argument that the litigants' contemplation of the Guidelines during their negotiations enables a court to later reduce an agreed-upon sentence.\textsuperscript{59} She maintained that the underlying negotiations are not determinative of whether a sentence is based upon the Guidelines.\textsuperscript{60}

\textsuperscript{51} Id. at 2694–95 (citations omitted).
\textsuperscript{52} Id. at 2695 (Sotomayor, J., concurring).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 2696.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 2697.
\textsuperscript{60} Id. ("I... cannot agree... that § 3582(c)(2) calls upon district courts to engage in a free-ranging search through the parties' negotiating history in search of a Guidelines sentencing range that might have been relevant to the
Yet, Sotomayor concluded that Freeman was entitled to relief given that the plain language of his plea agreement stated that the Guidelines were considered.\textsuperscript{61} She declared that when a plea agreement expressly states that the Guidelines provided the basis for the agreed-upon term then a court's acceptance of that term renders the sentence one that is "based on" the Guidelines.\textsuperscript{62} In reaching this conclusion, she added that she necessarily "reject[s] the categorical rule advanced by the Government and endorsed by the dissent" that prohibits defendants sentenced pursuant to type C agreements from availing themselves of a § 3582 remedy.\textsuperscript{63} She responded that type C agreements are designed to effectuate the intent of the parties in regards to sentencing.\textsuperscript{64} Therefore, when the agreement reflects the parties' employment of the Guidelines, a defendant may pursue modification pursuant to § 3582.\textsuperscript{65}

Sotomayor also submitted that this result does not deprive the government of the benefit of the bargain it negotiated with the defendant.\textsuperscript{66} She reiterated that the agreement itself reflects the intent of the parties, and when that agreement reflects that the Guidelines formed the basis for the agreed upon sentencing term, allowing relief pursuant to § 3582(c)(2) does not "result in certain defendants receiving an 'unjustified windfall.'"\textsuperscript{67} She explained, however, that prosecutors interested in foreclosing the possibility of defendants availing themselves of § 3582 relief could easily do so through the inclusion of waiver language in the plea agreement:

---

agreement or the court's acceptance of it. Nor can I agree with the plurality that the district judge's calculation of the Guidelines provides the basis for the term of imprisonment imposed pursuant to a (C) agreement.

\textsuperscript{61} Id. at 2699–2700 ("The agreement states that Freeman 'agrees to have his sentence determined pursuant to the Sentencing Guidelines,' and that 106 months is the total term of imprisonment to be imposed. The agreement also makes clear that the § 924(c)(1)(A) count to which Freeman agrees to plead guilty carries a minimum sentence of 60 months, 'which must be served consecutively to' any other sentence imposed. This leaves 46 months unaccounted for. The agreement sets Freeman's offense level at 19, as determined by the quantity of drugs and his acceptance of responsibility, and states that the parties anticipate a criminal history category of IV. Looking to the Sentencing Guidelines, an offense level of 19 and a criminal history category of IV produce a sentencing range of 46 to 57 months. Therefore, contrary to the dissent's curious suggestion that 'there is no way of knowing what th[e] sentence was "based on,"' it is evident that Freeman's agreement employed the 46-month figure at the bottom end of this sentencing range, in combination with the 60-month mandatory minimum sentence under § 924(c)(1)(A), to establish his 106-month sentence." (citations omitted)).

\textsuperscript{62} Id. at 2700.

\textsuperscript{63} Id. at 2698.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} Id. at 2698–99.
Finally, if the Government wants to ensure ex ante that a particular defendant's term of imprisonment will not be reduced later, the solution is simple enough: Nothing prevents the Government from negotiating with a defendant to secure a waiver of his statutory right to seek sentence reduction under § 3582(c)(2), just as it often does with respect to a defendant's rights to appeal and collaterally attack the conviction and sentence. In short, application of § 3582(c)(2) to an eligible defendant does not—and will not—deprive the Government of the benefit of its bargain.68

3. The Dissent of Chief Justice Roberts

In dissent, Roberts stated that he agreed with Sotomayor that sentences imposed pursuant to type C agreements are based not upon the Guidelines but upon the agreement.69 He further agreed with Sotomayor that the court's consideration of the Guidelines in determining whether to accept the agreement does nothing to alter this conclusion.70 A different result, Roberts submitted, would enable district courts to restructure binding plea agreements in ways unforeseen by the litigants.71

He disagreed, however, with Sotomayor's contention that a defendant may avail himself of a § 3582 remedy in instances where a plea agreement reflects the parties' consideration of the Guidelines.72 He described as "head-scratching" Sotomayor's distinction between evidence suggesting that the parties considered the Guidelines during their plea negotiations—which, according to her, would not permit § 3582 relief—and instances where "the agreement sets forth a specific term but it is somehow 'clear that the basis for the specified term is a Guidelines sentencing range'"—which, according to her, would permit § 3582 relief.73 Roberts argued that this constitutes a test that is "unworkable" and will lead to "arbitrary results."74

Roberts stated that this "confusion is compounded" given the different analytical tests employed by Sotomayor.75 He noted that Sotomayor had variously described the standard as whether the Guidelines were "expressly" employed by the agreement, were "evident" from the agreement, or "whether the agreement

---

68. Id. at 2699 (citations omitted).
69. Id. at 2700–01 (Roberts, C.J., dissenting) (writing that, at the moment of sentencing, the "District Court needed to consult one thing and one thing only—the plea agreement").
70. Id. at 2701.
71. Id.
72. Id.
73. Id. at 2702.
74. Id.
75. Id.
PLEA BARGAINING

'indicate[s] the parties' intent to base the term of imprisonment on a particular Guideline range.'

He further argued that the first and second halves of the concurrence suffered from a shift in analytical focus. Roberts noted that Sotomayor's opinion initially restricted itself to a review of the judge's conduct. He stated that when a court accepts the plea agreement, "the judge considers only the fixed term in the agreement, so the sentence he actually imposes is not 'based on' the Guidelines." The opinion's second half, according to Roberts, shifted its analytical focus to the litigating parties and the possible role the Guidelines played in their underlying negotiations. This was improper, Roberts submitted, because § 3582(c)(2) is a sentencing provision, and "[o]nly a court can sentence a defendant." Accordingly, whether the parties contemplated the Guidelines in arriving at the binding sentencing term is irrelevant to this analysis.

His conclusion that sentences imposed pursuant to binding plea agreements do not constitute guideline sentences for purposes of § 3582 is, according to Roberts, buttressed by section 1B1.10(b)(1) of the Guidelines. He explained:

[Section] 3582(c)(2) requires a district court "to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification." According to § 1B1.10(b)(1), the court must first determine "the amended guideline range that would have been applicable to the defendant" if the retroactively amended provision had been in effect at the time of his sentencing. "In making such determination, the court shall substitute only the amendments... for the corresponding guideline provisions that were applied when the defendant was sentenced."

As noted, the District Court sentenced Freeman pursuant to the term specified by his plea agreement; it never "applied" a Guidelines provision in imposing his term of imprisonment. The fact that the court may have "use[d] the Guidelines as a yardstick in deciding whether to accept a (C) agreement does not mean that the term of imprisonment imposed by the court is 'based on' a particular Guidelines sentencing range."

76. Id. (alteration in original).
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id. at 2702–03 (citations omitted).
Roberts further argued that there is nothing in Freeman's plea agreement to suggest that the parties contemplated a possible sentencing reduction pursuant to § 3582. He submitted that "it is fanciful to suppose that the parties would have said '106 months' if what they really meant was 'a sentence at the lowest end of the applicable Guidelines range.'" Roberts claimed that in the binding plea context it is difficult, if not impossible, to ascertain the precise basis for the agreed upon fixed term. He posited, inter alia, that resource allocation assessments, witness credibility concerns, and uncertainty as to the applicable guideline range could conceivably underlie a party's decision to agree to a specified term.

II. ANALYSIS OF THE FREEMAN OPINIONS

At its core, the ruling in Freeman is one about statutory interpretation. At issue was whether a sentence that emanated from a type C plea agreement was "based on" (as the term is used in § 3582(c)(2)) the applicable guideline range or on the plea agreement. If the former, then a § 3582(c)(2) remedy could be pursued. If the latter, then a § 3582(c)(2) remedy would be unavailable.

I agree with Kennedy that the plain language of 18 U.S.C. § 3553 and section 6B1.2(c) of the Guidelines, the references made by the district court to the Guidelines during the imposition of Freeman's sentence, and the fairness objectives underlying the Commission's amendment of the Guidelines are meaningful indicators that the sentence imposed in Freeman was "based on" the Guidelines. It is difficult to ignore the mandates contained in § 3553 and section 6B1.2(c) that instruct district courts to consider the Guidelines when imposing a sentence. Nowhere do these sections except sentences that stem from binding pleas from this requirement. In fact, the commentary to section 6B1.2 plainly instructs courts to consider the Guidelines in the type C plea context. And the sentencing transcript in Freeman reveals that the court did just that. Moreover, there is nothing to suggest that the Commission, when amending the guideline ranges applicable to crack cocaine offenses, intended to differentiate between those offenders based upon the type of plea agreement that was tendered.

84. Id. at 2703.
85. Id.
86. Id.
87. Id.
88. Id. at 2691 (plurality opinion).
89. Id. at 2701 (Roberts, C.J., dissenting).
90. Id. at 2692–95 (plurality opinion).
92. Freeman, 131 S. Ct. at 2691.
Based upon the foregoing, it is more than plausible to conclude that an individual in Freeman's position should be permitted to avail himself of a § 3582(c)(2) remedy. Yet, the opposite conclusion—that, in the type C plea context, a court is basing its sentence not upon a range of eligible sentencing options delineated in the Guidelines but upon, and only upon, the single numerical figure contained in the plea agreement—is another equally plausible outcome.

In the end, the conclusions reached in all three Freeman opinions were guided primarily by different definitional approaches to the plain meaning of the statutory text rather than by controlling legal principles and precedents. How to interpret the term "based on" and how to apply it in the Freeman context ultimately depended upon whether the Justices decided to construe the term narrowly or broadly. The Court's broad constructionists concluded that "based on" encompassed a court's activities pursuant to § 3553 and section 6B1.2(c). Thus, a court that accepted a binding plea agreement and factored the Guidelines as part of its decision-making calculus necessarily based its sentence upon the Guidelines. The Court's strict constructionists, however, rejected this view. From their perspective, sentences that stem from type C plea agreements are usually, if not categorically, beyond the realm of § 3582(c)(2). Thus, a court's consideration of the Guidelines, even if performed in strict accordance with § 3553 and section 6B1.2(c), is generally, if not entirely, an irrelevant inquiry. Instead, they submitted, the focus is largely, if not always, singular—upon the plea agreement itself.

93. Id. at 2695.
94. Id.
95. Id. at 2700 (Roberts, C.J., dissenting).
96. Id. at 2701.
97. Id. at 2695–96 (Sotomayor, J., concurring) ("To ask whether a particular term of imprisonment is 'based on' a Guidelines sentencing range is to ask whether that range serves as the basis or foundation for the term of imprisonment. . . . As a result, in applying § 3582(c)(2) a court must discern the foundation for the term of imprisonment imposed by the sentencing judge. As the plurality explains, in the normal course the district judge's calculation of the Guidelines range applicable to the charged offenses will serve as the basis for the term of imprisonment imposed. Sentencing under (C) agreements, however, is different. At the time of sentencing, the term of imprisonment imposed pursuant to a (C) agreement does not involve the court's independent calculation of the Guidelines or consideration of the other 18 U.S.C. § 3553(a) factors. The court may only accept or reject the agreement, and if it chooses to accept it, at sentencing the court may only impose the term of imprisonment the agreement calls for; the court may not change its terms. In the (C) agreement context, therefore, it is the binding plea agreement that is the foundation for the term of imprisonment to which the defendant is sentenced. At the moment of sentencing, the court simply implements the terms of the agreement it has already accepted. Contrary to the plurality's view, the fact that USSG [sic] § 6B1.2(c) . . . instructs a district court to use the Guidelines as a yardstick in...")
No doubt, statutory interpretation must often occur in a vacuum. The absence of governing interpretative standards characterizes many attempts at statutory interpretation in criminal and noncriminal contexts. However, such was not the case in *Freeman*. As detailed below, the realities that underlie plea bargaining in the context presented in *Freeman* and the proper application of contractual law principles would have yielded a clear, legitimate, and authoritative basis upon which to resolve the issue presented.

A. The Real World of Plea Bargaining

As noted, Chief Justice Roberts stated that "it is fanciful to suppose that the parties would have said '106 months' if what they really meant was 'a sentence at the lowest end of the applicable Guidelines range.'"\(^{98}\) Yet, the realities that characterize plea negotiations in *Freeman*-type contexts strongly suggest such an interpretation—namely, that the 106-month term should not be construed literally but should be interpreted to mean the low end of the applicable guideline range.

In any case where a pretrial settlement is successfully negotiated, the defense attorney must invariably confront and overcome certain impediments. The many obstacles that potentially impede successful negotiations include the stigma associated with a conviction, client distrust, length of potential imprisonment, noncollateral and collateral consequences associated with pleading guilty, and views of family members. These risks become all the more real in the context of felony offenses and are particularly acute in narcotics trafficking and firearms cases that carry significant terms of imprisonment.

Minimum mandatory sentences often characterize convictions for narcotic and firearm offenses, and these statutory minimums often double for defendants who have certain criminal histories.\(^{99}\) Thus, it is hardly unusual for a defendant charged with offenses of this type to be confronted with five-, ten-, or twenty-year minimum mandatory sentences.\(^{100}\) Even the Supreme Court's decision in deciding whether to accept a (C) agreement does not mean that the term of imprisonment imposed by the court is 'based on' a particular Guidelines sentencing range. The term of imprisonment imposed by the sentencing judge is dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation. In short, the term of imprisonment imposed pursuant to a (C) agreement is, for purposes of § 3582(c)(2), 'based on' the agreement itself. (citations omitted)).

---

98. *Id*. at 2703 (Roberts, C.J., dissenting).
100. *See*, e.g., United States v. Campbell, 436 F. App'x 518, 532–33 (6th Cir. 2011) (applying a five-year mandatory sentence for possessing a firearm in furtherance of a drug-trafficking offense); United States v. Nelson, 484 F.3d 257, 258 (4th Cir. 2007) (applying a ten-year mandatory sentence for narcotics
United States v. Booker, which declared the mandatory application of the Guidelines to be unconstitutional, has done little to assuage the concerns of defendants in such predicaments. Courts are still bound to consider the Guidelines when imposing a sentence and, more often than not, impose sentences within the recommended ranges.

Typically, defendants have little leverage to negotiate meaningful concessions from the government, which, more often than not, has significant trial and resource advantages. And the government, bound by mandatory minimums and guideline ranges, is often constricted in its ability to circumvent the severe penalties that accompany certain crimes. With little room to maneuver, many defendants are reluctant to forgo their right to a jury trial.

One of the few reasonably attractive carrots that can be offered to a defendant in such circumstances is the binding plea agreement. Such an agreement, if accepted by the court, guarantees the defendant the sentence specified in the document. Thus, if the court accepts the agreement, the defendant has the peace of mind of knowing with certainty his sentencing term. Conversely, should the court decline to accept the agreement, the defendant is free to withdraw his guilty plea and proceed to trial.

This, of course, was the option agreed to by Freeman and ultimately proffered by the prosecution and defense to the court (which accepted the agreement). Despite the fixed term, however, the selling point of a type C agreement in this context is, except in the most unusual of circumstances, not the numerical figure delineated in the agreement but the low end of the applicable guideline range. In Freeman, that guideline figure was forty-six possession with intent to distribute based on defendant's prior felony drug offense); United States v. Byrd, 208 F. App'x 216, 217–18 (4th Cir. 2006) (applying a ten-year mandatory sentence for discharging a firearm in furtherance of a drug trafficking crime); United States v. Gargano, 144 F. App'x 905, 906 (2d Cir. 2005) (applying a twenty-year mandatory minimum sentence to a narcotics violation based on the defendant's earlier felony drug conviction); United States v. Quinn, 18 F.3d 1461, 1467 (9th Cir. 1994) (remanding to impose a twenty-year mandatory minimum sentence on a defendant guilty of two counts of using a firearm during a crime of violence based on his two previous felony convictions); United States v. Savinovich, 845 F.2d 834, 840 (9th Cir. 1988) (upholding a five-year mandatory sentence for the defendant's conviction of possession of cocaine with intent to distribute and attempt to distribute).

102. Id. at 250.
104. FED. R. CRIM. P. 11(c)(5).
months. This was based upon a projected applicable base offense level of nineteen and a criminal history category of IV.

Often, the government and the defense attorney correctly estimate the base offense level and criminal history categories. Sometimes they do not. If, for example, the district court during Freeman's sentencing hearing had determined that Freeman's criminal history came to a level III as opposed to IV, his guideline range would have been thirty-seven to forty-six months (coincidently, the same guideline range applicable to Freeman after the 2007 amendments to the Guidelines). If, after the acceptance of Freeman's plea, the court at sentencing reached such a conclusion, it could not be credibly argued that it was the parties' intent that Freeman be sentenced at the high-end of the applicable range (forty-six months). It would be foolhardy to suggest that someone in Freeman's position intended to agree to a binding sentence that would reach the maximum of the new guideline range. Indeed, the goal of all the parties was to provide Freeman with the lowest possible sentence, considering mandatory minimums and the range of sentences under the Guidelines. A binding sentence at the lowest end of whatever the applicable guideline range constituted the most efficient way to dispose of the case pretrial. And, perhaps, it may have been the only way. The government would get a conviction with a meaningful term of imprisonment; the defendant would have certainty that his prison exposure would be kept at a minimum; and the court, like the other parties, would avoid the time associated with trying the case.

It is undeniable that circumstances may arise where the fixed term should be construed literally. Obviously, had Freeman's agreement included a numerical figure well above or below the applicable range, it might be difficult to argue persuasively that the Guidelines formed a basis for the proposed term. In such circumstances, relief pursuant to § 3582(c)(2) should probably be precluded. But this was not the circumstance in Freeman where the evidence clearly suggested that the 106-month term was the product of a nonnegotiable sixty-month mandatory minimum and a forty-six-month term, which equated directly with the lowest possible sentence of the guideline range anticipated by all the parties.

In situations where the binding sentencing term falls within the applicable guideline range, a presumption that the sentence was

---

106. Id.
108. Freeman, 131 S. Ct. at 2691.
109. This Article will explain later in this Subpart why there are three parties (as opposed to two) to a plea agreement contract—the prosecution, the defendant, and the court. See infra Part II.C.
110. Freeman, 131 S. Ct. at 2691.
PLEA BARGAINING

based upon the Guidelines should be assumed by the courts. This presumption is a natural consequence of the realities of plea bargaining that underlie the Freeman context and analogous circumstances. In situations where the binding term falls outside the applicable range, no presumption should apply, and the court should proceed to decide the case based upon the intent of the parties. Ascertaining the intent of the parties in Freeman and non-Freeman contexts is an essential precondition to deciding any such cases. Thus, irrespective of whether a particular case triggers the presumption, it is vital that the court ascertain the intent of the parties. Typically, this intent can be discerned through a review of the plea agreement contract. However, as the following Subpart explains, proper understanding of contractual law in the plea agreement context is an essential prerequisite.

B. Contractual Analysis

As noted, in her controlling opinion, Justice Sotomayor concluded that sentences that stem from a binding plea agreement are based not upon the Guidelines but upon the agreement itself, unless the terms of the plea agreement make a contrary indication. Since Freeman's agreement reflected that the government and the defendant considered the Guidelines in formulating the agreed-upon sentence, Sotomayor found that he was entitled to relief under the statute.

Kennedy and Roberts agreed that Sotomayor's focus upon the verbiage in the plea agreement was misplaced. Kennedy wrote:

As noted, the opinion concurring in the judgment suggests an intermediate position. That opinion argues that in general defendants sentenced following 11(c)(1)(C) agreements are ineligible for § 3582(c)(2) relief, but relief may be sought where the plea agreement itself contemplates sentence reduction. The statute, however, calls for an inquiry into the reasons for a judge’s sentence, not the reasons that motivated or informed the parties.

Similarly, Roberts commented:

The error in the concurring opinion is largely attributable to a mistaken shift in analysis. In the first half of the opinion, the inquiry properly looks to what the judge does: He is, after all, the one who imposes the sentence. After approving the agreement, the judge considers only the fixed term in the agreement, so the sentence he actually imposes is not “based on” the Guidelines.

111. Id. at 2695 (Sotomayor, J., concurring).
112. Id. at 2694 (plurality opinion).
In the second half of the opinion, however, the analysis suddenly shifts, and focuses on the parties: Did they "use" or "employ" the Guidelines in arriving at the term in their agreement? But § 3582(c)(2) is concerned only with whether a defendant "has been sentenced to a term of imprisonment based on a sentencing range." Only a court can sentence a defendant, so there is no basis for examining why the parties settled on a particular prison term.113

Given Sotomayor's supposition that only two parties—the prosecution and defense—are parties to a plea agreement contract, Kennedy and Roberts are correct in their assessment.114 The plea agreement verbiage would necessarily reflect the intent of the parties who brokered the agreement. And if the court is not a party to the agreement and § 3582(c)(2) is concerned with the conduct of the sentencing court (as opposed to the litigants), the criticism leveled by Kennedy and Roberts would appear to be just.

Despite this analytical misstep, Sotomayor was nevertheless correct to focus upon the plain language in the plea agreement. This will become evident in the following Subpart, which will dispel a common myth regarding plea agreement contracts, supplant it with a new interpretation, and, in the process, explain why it is appropriate to rely upon the text of a plea agreement in this context.

C. Plea Agreement Contracts—General Principles

The predominant—and mistaken—construction of plea agreements is that they are unilateral contracts between the prosecution and the defendant, with acceptance occurring only when

113. Id. at 2702 (Roberts, C.J., dissenting).

114. Sotomayor's belief in a two-party agreement is evident from the following passage from her concurrence. Specifically, she submits that sentences that stem from binding plea agreements generally should not be construed as Guidelines-based sentences because a different conclusion would empower courts to impose sentences contemplated by neither the government nor the defendant:

Although district courts ordinarily have significant discretion in determining the appropriate sentence to be imposed on a particular defendant, under Rule 11(c)(1)(C) it is the parties' agreement that determines the sentence to be imposed. To be sure, the court "retains absolute discretion whether to accept a plea agreement," but once it does it is bound at sentencing to give effect to the parties' agreement as to the appropriate term of imprisonment.

Allowing district courts later to reduce a term of imprisonment simply because the court itself considered the Guidelines in deciding whether to accept the agreement would transform § 3582(c)(2) into a mechanism by which courts could rewrite the terms of (C) agreements in ways not contemplated by the parties.

Id. at 2696 (Sotomayor, J., concurring) (emphasis added) (citations omitted).
the defendant actually enters his guilty plea.\textsuperscript{115} Instead, plea agreements are properly viewed as bilateral arrangements involving three parties: the prosecution, the defendant, and the court.\textsuperscript{116}

It is well understood that an enforceable contract requires an offer, an acceptance, and consideration.\textsuperscript{117} And while it is true that the prosecution and the defendant negotiate the terms of the agreement that may ultimately form the basis for the resolution of the underlying litigation, that does not render the written product of those negotiations (i.e., the plea agreement) an enforceable document.\textsuperscript{118}

In fact, absent judicial assent, a plea agreement is devoid of legal significance.\textsuperscript{119} To see this, consider the following. In the federal system, a defendant who wishes to enter a guilty plea must present himself to the court and formally change his plea from not guilty (which he entered at his arraignment) to guilty.\textsuperscript{120} However,

\begin{itemize}
\item \textsuperscript{115} Gov't of the Virgin Islands v. Scotland, 614 F.2d 360, 364 (3d Cir. 1980) ("[P]lea agreements are often likened to unilateral contracts—consideration is not given for the prosecutor's promise until the defendant actually enters his plea of guilty."); Denton v. Martel, No. 2:03-cv-02041-TMB, 2008 WL 5103349, at *3 (E.D. Cal. Dec. 3, 2008) ("In the usual plea agreement, the consideration given for the prosecutor's promise is not a corresponding promise on the part of the defendant, but the defendant's actual performance by pleading guilty. The agreement is therefore in the nature of a unilateral contract."); State v. King, 721 S.E.2d 327, 330 (N.C. Ct. App. 2012) ("Normally, plea agreements are in the form of unilateral contracts and the consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading."); Sarah Baumgartel, Nonprosecution Agreements as Contracts: Stolt-Nielson and the Question of Remedy for a Prosecutor's Breach, 2008 Wis. L. Rev. 25, 38-39 (2008) ("As with plea agreements, nonprosecution and cooperation agreements are best categorized as unilateral contracts, meaning the prosecutor exchanges a promise of leniency for some performance from the company, and the parties are bound only at the point the company performs, either by pleading guilty or by cooperating."); For additional citations, see Julian A. Cook, III, All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants, 75 U. Colo. L. Rev. 863, 879-80 nn.79-80 (2004).
\item \textsuperscript{116} Joseph A. Colquitt, Ad Hoc Plea Bargaining, 75 Tul. L. Rev. 695, 773 (2001) ("[T]he court is the party that accepts the offer, which comes from both the prosecutor and the defendant.").
\item \textsuperscript{117} See, e.g., Brown v. United States, 384 F. App'x 815, 819 (10th Cir. 2010); Bank of Guam v. United States, 578 F.3d 1318, 1326 (Fed. Cir. 2009).
\item \textsuperscript{118} Constitutional safeguards necessarily prohibit strict adherence to contract law principles in the plea agreement context. McKeever v. Warden SCI-Graterford, 486 F.3d 81, 97 (3d Cir. 2007) ("[I]t is important to remember that plea agreements are 'constitutional contracts' and unlike contracts in other spheres must 'be construed in light of the rights and obligations created by the Constitution.'").
\item \textsuperscript{119} In rare instances, a plea agreement that has not been judicially accepted may yet be enforced if the defendant can demonstrate that he detrimentally relied upon the prosecutor's promise. See Mabry v. Johnson, 467 U.S. 504, 509–10 (1984).
\item \textsuperscript{120} FED. R. CRIM. P. 11(b).
\end{itemize}
before a guilty plea may be deemed valid, a court must be satisfied that the plea was entered voluntarily (i.e., free of undue coercion),\textsuperscript{121} knowingly (with sufficient awareness of the constitutional rights he will forgo and the accompanying sentencing consequences),\textsuperscript{122} and with a sufficient factual basis to support the plea.\textsuperscript{123} If these prerequisites are satisfied, then the court may formally accept a defendant's change of plea.\textsuperscript{124} This acceptance, however, is distinct from the court's acceptance of the plea agreement, which typically occurs several weeks later at the time of sentencing.

On the one hand, it is true that, in the typical case, once the defendant changes his plea and that plea is accepted by the court, the defendant has fully performed pursuant to the agreement. After all, the typical plea bargain calls upon the defendant to perform a singular act—to formally change his plea.\textsuperscript{125} It is also true, at such a moment, that the prosecution may not withdraw from the agreement, and the defendant may only withdraw if he can present a fair and just reason.\textsuperscript{126} Yet, in contrast to the law on unilateral contracts, a defendant, despite his full and complete performance, cannot demand the promises contained in the agreement.\textsuperscript{127}

\begin{footnotes}
\item[121] Id. 11(b)(2).
\item[122] Id. 11(b)(1).
\item[123] Id. 11(b)(3).
\item[124] Id. 11(b).
\item[125] Of course, sometimes plea agreements might have additional clauses, such as cooperation clauses that require a defendant to assist the government after he has formally changed his plea. But such clauses do not impact this analysis. As will be argued, the plea agreement proffered by the prosecution and the defendant is, subject to a detrimental reliance exception, without significance until the court formally accepts the agreement. Thus, no matter how much the defendant performs—even if the prosecution is fully satisfied with such performance—the enforceability of the agreement is, in almost every circumstance, dependent upon the court's acceptance.
\item[126] \textsc{Fed. R. Crim. P. 11(d)(2)(B)}.
\item[127] For a more detailed discussion explaining why a plea agreement fits neither the unilateral model nor the contract subject to a condition model, see Cook, \textit{supra} note 115, at 883–99. Reproduced below is an excerpt from the article addressing the unilateral contract contention:

\begin{quote}
With unilateral contracts, once performance is complete an acceptance has occurred and a valid contract is formed. Thus, a promisee is entitled to demand his promised contractual return upon satisfaction of his performance obligation. However, in the context of plea agreements, the courts, though adoptive of the unilateral classification, deviate noticeably from its normative conceptions. When a defendant enters a guilty plea and the court accepts that plea, the court has made a determination that the defendant has fully performed his contractual obligation. At that moment, the Rule 11 requirements have been satisfied and the defendant's performance is complete. Indeed, there is nothing more a defendant can do but wait for the promised return. Yet contrary to the law attendant to unilateral contracts, a defendant, despite having fully performed, is \textit{not} entitled to demand performance under the contract. As noted,
\end{quote}
\end{footnotes}
The critical event that determines the enforceability of a plea agreement is whether or not the court formally accepts the proposed resolution. If the agreement is rejected, neither the prosecution nor the defendant is bound to its terms. On the other hand, if the agreement is accepted, only then does the contract become binding upon the prosecution and the defendant. Thus, the term "plea agreement" is somewhat of a misnomer, given that any "agreement" reached between the prosecution and the defendant is without legal significance absent judicial acceptance.

In the prototypical bilateral arrangement, when an offer is accepted, a binding contractual agreement is created. This model exemplifies what occurs in the plea agreement context. The prosecution and the defendant are, essentially, joint offerors who present an offer—in the form of a plea agreement—to the court seeking its acceptance. In other words, when the prosecution and the defendant enter into a "plea agreement," they have negotiated nothing more than a "plea proposal." This "plea proposal," when presented to the court, constitutes a contractual offer to resolve the case pursuant to the terms stipulated in the joint offer. If rejected, the document reflecting the plea proposal is devoid of enforceable significance. If, however, the court accepts the offer, then an enforceable binding agreement is created. The next Subpart applies these principles to the *Freeman* case.

---

*Hyde* observed that a court, after having accepted a guilty plea, retained the discretion to defer acceptance of a plea agreement. The Court then somewhat blithely added that should the court reject the agreement, the defendant would then be afforded the opportunity to withdraw his guilty plea. This is akin to holding that an individual who, in exchange for a promise to receive $100 if he crossed a bridge, could not enforce the agreement upon crossing and could simply return across the bridge if the promised return was not eventually honored. Whereas a promisee under any other unilateral contract is entitled to enforce the agreement, a criminal defendant is not. The fact that a defendant must perform and then wait until some future moment before learning whether he will get the promised benefit is flatly inconsistent with the law attendant to unilateral contracts, and it is flatly inconsistent because a plea agreement is not a unilateral contract.

*Id.* at 884–85 (citing United States v. Hyde, 520 U.S. 670, 675, 677–78 (1997)).

128. *FED. R. CRIM. P. 11(c)(5)* (stating that, in the event the court rejects the plea agreement, the court must inform the defendant of its decision and afford the defendant the opportunity to withdraw his guilty plea).

129. As noted, the court's acceptance or rejection of the plea agreement invariably occurs at sentencing. *FED. R. CRIM. P. 11(e)* provides that after the sentence is imposed, "the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack."
D. Contractual Principles—Application to Freeman

Given that the prosecution, the defendant, and the court are all parties to the plea agreement, the language delineated in the agreement is necessarily instructive as to their intent. In *Freeman*, the verbiage of the plea contract plainly evidences the use and anticipated use of the Guidelines by the government, Freeman, and the court in formulating Freeman's sentence.

Paragraph 11 of the agreement states the anticipated guideline base offense level and criminal history category. It provides that the parties anticipate, based upon the drug quantity identified in paragraph 10 (3.4 grams of crack cocaine), that Freeman's base

---

130. Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999) ("Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself."); Burchick Constr. Co. v. United States, 83 Fed. Cl. 12, 17 (Fed. Cl. 2008) ("We give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning." (quoting Jowett, Inc. v. United States, 234 F.3d 1365, 1368 (Fed. Cir. 2000))).

131. Paragraph 11 of the *Freeman* plea agreement provides:

11. Both parties have independently reviewed the Sentencing Guidelines applicable in this case, and in their best judgment and belief, conclude as follows:

A. The Applicable Offense Level should be determined as follows:

<table>
<thead>
<tr>
<th>Base offense level</th>
<th>USSG § 2D1.1 (drug quantity table)</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>-3 USSG § 3E1.1(a) &amp; (b)</td>
</tr>
</tbody>
</table>

Adjusted offense level

C. The foregoing statements of applicability of sections of the Sentencing Guidelines and the statement of facts are not binding upon the Court. The defendant understands the Court will independently calculate the Guidelines at sentencing and defendant may not withdraw the plea of guilty solely because the Court does not agree with either the statement of facts or Sentencing Guideline application.


132. Paragraph 10 of the *Freeman* plea agreement reads, in pertinent part:

At the time of sentencing, the United States will
- recommend a fine at the lowest end of the applicable Guideline Range, to be due and payable on the date of sentencing.
- recommend a reduction of 3 levels below the otherwise applicable Guideline for "acceptance of responsibility" as provided by §3E1.1(a) and (b), provided the defendant does not engage in
offense level would be twenty-two.\textsuperscript{133} Paragraphs 10 and 11 also reference an anticipated three-level reduction in the base offense level for acceptance of responsibility, resulting in an overall offense level of nineteen.\textsuperscript{134} Paragraph 11 states that the parties believe that Freeman will have a criminal history category of IV.\textsuperscript{135}

That same paragraph also explicitly states the parties' understanding that Freeman would receive a sixty-month sentence for the firearm offense that would run consecutive to the sentence imposed for the crack cocaine.\textsuperscript{136} When the sixty-months is combined with the low end of the guideline range then applicable to an offense level nineteen, criminal history category IV (forty-six months), you arrive at the 106-month figure. Paragraph 11 further states that "the Court will independently calculate the Guidelines at sentencing."\textsuperscript{137} This fact is reiterated in paragraph 12, which provides that Freeman "agrees to have his sentence determined pursuant to the Sentencing Guidelines."\textsuperscript{138}

This straightforward application of contract law provides a clear, firm foundation upon which to adjudicate not only the issue presented in \textit{Freeman} but also any other factual construct where the propriety of a § 3582(c)(2) request is presented. In \textit{Freeman}, the plea agreement was replete with language referencing the Guidelines and their consideration in the calculus of the binding sentencing term. And I suspect that the overwhelming majority of cases will fit the \textit{Freeman} prototype. But even in those rare instances where an agreement is negotiated independent of guideline considerations, contract law, when appropriately considered and applied, can decipher this intent and provide a firm basis upon which to resolve any such disputes.

\begin{itemize}
\item future conduct which violates a condition of bond, constitutes obstruction of justice, or otherwise demonstrates a lack of acceptance of responsibility. Should such conduct occur and the United States, therefore, opposes the reduction for acceptance, this plea agreement remains binding and the defendant will not be allowed to withdraw his plea.
\item stipulate that the quantity of drugs involved in this case is 3.4 grams of a mixture or substance containing cocaine base and 1.6 grams of marijuana.
\item agree that a sentence of 106 months' incarceration is the appropriate disposition of this case.
\end{itemize}

\textit{Id.} at 25a–26a.

\textsuperscript{133} \textit{Id.} at 27a.

\textsuperscript{134} \textit{Id.} at 26a–27a.

\textsuperscript{135} \textit{Id.} at 28a.

\textsuperscript{136} \textit{Id.} at 27a.

\textsuperscript{137} \textit{Id.} at 28a.

\textsuperscript{138} \textit{Id.}
III. JUSTICE SOTOMAYOR'S PREEMPTIVE WAIVER CLAUSE SUGGESTION AND THE REAL WORLD CONSEQUENCES

Justice Sotomayor stated, in dicta, that federal prosecutors intent on securing fixed sentencing terms can achieve this end through a simple maneuver: the inclusion of waiver clauses in plea agreements precluding future attempts at reductions pursuant to § 3582(c)(2). As she correctly observed, federal prosecutors regularly incorporate in their plea agreements waiver provisions in regards to a defendant's appellate rights (direct appeal and collateral).

As noted, Justice Kennedy suggested that retroactive application of guideline amendments is an infrequent occurrence. If true, then adoption by the Department of Justice of Sotomayor's proposed remedy, should it occur, would be of little consequence. Contrary to his claim, however, the Commission adopts retroactive amendments with some regularity. Since the Guidelines took effect in 1987, the Commission has implemented at least twenty retroactive amendments and has imposed reforms (sometimes quite significant) that have impacted an array of narcotic and nonnarcotic activity.

Should the Department of Justice heed Sotomayor's suggestion, not only will a large class of criminal defendants be deprived of the ability to take advantage of the Commission's sentencing modifications, but the objective underlying the Guidelines—the achievement of greater equity in sentencing—will be noticeably undermined. Given the potential applicability of such a policy to binding and nonbinding pleas, future attempts by the Commission to extend equitable reforms to those already convicted could be largely preempted.

The ability (and incentive) of the defense community to mount meaningful resistance to Department of Justice efforts to broadly incorporate § 3582(c)(2) waivers is virtually nil. Aside from the obvious bargaining advantages possessed by federal prosecutors, the defense bar already lost the constitutionality battle over the appellate waiver provisions, which are now standard fare in a great many, if not most, federal plea agreements. And the stakes

139. *Freeman*, 131 S. Ct. at 2699 (Sotomayor, J., concurring).
140. *Id.*
141. *Id.* at 2693 (plurality opinion).
142. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(c) (2011).
143. *See* United States v. Stabile, 633 F.3d 219, 248 (3d Cir. 2011) ("[I]t will be a rare and unusual situation when claims of an unreasonable sentence, standing alone, will be sufficient to invalidate a waiver because of a miscarriage of justice." (alteration in original) (quoting United States v. Jackson, 523 F.3d 234, 244 (3d Cir. 2008))); United States v. Manigan, 592 F.3d 621, 627 (4th Cir. 2010) (deciding not to enforce the defendant's appellate waiver); United States v. Newbert, 504 F.3d 180, 182 (1st Cir. 2007) ("This court, following suit, will enforce knowing and voluntary waivers by defendants in plea agreements of
attendant to a forfeiture of rights in this circumstance are no
greater than those in the appellate and collateral rights context.
Moreover, the use of § 3582(c)(2) waiver provisions has already been
tried and upheld in at least one circuit (the Tenth Circuit).\textsuperscript{144}

It is well settled that a defendant is empowered to waive certain
constitutional protections (e.g., the Sixth Amendment right to trial
and to counsel) and statutory rights (e.g., the right to appeal) as part
of a negotiated settlement.\textsuperscript{145} And there is little doubt that future
courts, when asked to decide upon the constitutionality of §
3582(c)(2) waivers, will readily conclude—as did the Tenth Circuit—
that such statutory forfeitures are analogous to appellate waivers
and are valid provided they were made knowingly and
voluntarily.\textsuperscript{146} Yet the waiver of a § 3582(c)(2) right is troubling
given that its forfeiture impacts not only individual interests but
also undercuts public policy. As noted, the laudable objective
underlying the Guidelines is the attainment of greater equity in
sentencing, and § 3582(c)(2) is a mechanism through which those
previously convicted can benefit from the Commission's reforms.\textsuperscript{147}
However, judicial sanction of such waivers would effectively
empower federal prosecutors with the authority to undercut such
legislative objectives by fiat.

This disconcerting public policy reality is matched, if not
exceeded, by the meaningful real life consequences that such
waivers could have upon convicted individuals who were sentenced
pursuant to inequitable guideline procedures. Consider the
following three examples. The first involves a guideline amendment
for a nonnarcotics offense, while the latter two amendments affect
guideline sentencing for narcotics crimes.

A. Career Offender Amendment

In 1991, the Commission amended the commentary to section
4B1.2, which defines the terms used in the “Career Offender” section
(section 4B1.1).\textsuperscript{148} In short, section 4B1.1 addresses sentencing for

their rights to appeal, except when it would work a miscarriage of justice.");
United States v. Rodriguez, 360 F.3d 949, 959 (9th Cir. 2004) (“Under the
express terms of his plea agreement, Rodriguez has, therefore, waived his right
to appeal his sentence.”).

144. United States v. Rivers, No. 11-3100, 2012 WL 3667450, at *1 (10th Cir.
3582(c)(2) sentence-reduction motions.”); United States v. Maldonado-Ortega,
No. 12-3097, 2012 WL 2129397, at *2 (10th Cir. June 13, 2012) (granting the
“government's motion to enforce the appeal waiver”); United States v. Frierson,
413 F. App'x 83, 85 (10th Cir. 2011) (per curiam) (upholding the defendant's
waiver of right to pursue § 3582(c)(2) relief).


146. Frierson, 413 F. App'x. at 85.


individuals classified as "career offenders" and provides for enhanced penalties for individuals who are convicted of either a "crime of violence" or a "controlled substance offense" and have at least two prior offenses that fall within either of the aforementioned classifications. Among other changes, the amended commentary addressed an issue that had split the circuit courts, namely, whether the crime of felon in possession of a firearm constitutes a "crime of violence" for purposes of determining whether an individual should be sentenced as a "career offender." The amendment answered this question in the negative.

The retroactive application of this amendment was at issue in United States v. Beckley. There the defendant entered a guilty plea to a felon in possession of a firearm charge and was sentenced to a term of 300 months after the court determined that he was a career offender. His plea and sentence were entered prior to the 1991 amendment. After the amendment (which, as noted, excluded the crime of felon in possession of a firearm from the crime of violence definition), the defendant moved the district court for a sentence modification pursuant to § 3582(c)(2). The district court reversed, concluding that the defendant was entitled to retroactive relief and, thus, a reduced sentence. The defendant was ultimately resentenced to a term of 190 months.

B. LSD Weight Determination Amendment

Also, in 1993, the Commission issued Amendment 488, which altered the method by which district courts calculated the weight attributable to offenses involving LSD. Prior to the amendment, district courts included not only the weight of the narcotic in determining the appropriate base offense level but also the weight of

149. Id. § 4B1.1.
151. Id. § 924(e). This section requires the imposition of a minimum fifteen-year sentencing term of imprisonment for recidivists convicted of unlawful possession of a firearm under 18 U.S.C. § 922(g). Section 924(e) applies only to those defendants who have three prior state or federal convictions for violent felonies or serious drug offenses.
152. 30 F.3d 134 (6th Cir. 1994).
153. Id. at 134.
154. Id.
155. Id.
156. Id.
157. Id. ("In view of the United States Supreme Court’s recent ruling that amendments to the Guidelines and their amended commentary are binding on the federal courts, we conclude that the district court has no discretion in this matter, but must apply the Amendment 433 retroactively to the defendant’s sentence." (citations omitted)).
158. United States v. Beckley, 57 F.3d 1070, 1070 (6th Cir. 1995).
the carrier medium. As an explanation for the change, the Commission set forth the following explanation in its amended commentary to section 2D1.1:

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

Amendment 488 was at issue in United States v. Coohey. There, the defendant was convicted and, in 1992, sentenced on a trafficking charge involving LSD. The court imposed a sentence of 298 months, based, in part, upon its conclusion that the 5950 dosages of LSD attributable to the defendant weighed 38.675 grams. Subsequent to the enactment of Amendment 488, the Eighth Circuit had the opportunity to consider whether the defendant might be eligible for retroactive modification of his sentence. The Eighth Circuit commented:

After Coohey was sentenced by the District Court, the Sentencing Commission amended the Sentencing Guidelines provision that specifies the method for determining the weight of LSD for sentencing purposes. Effective November 1, 1993, U.S.S.G. § 2D1.1(c) (Nov. 1993) now provides that the weight of LSD for sentencing purposes is to be determined by treating each dose of LSD as weighing 0.4 milligrams. Applying this provision, the weight of LSD for which Coohey is responsible for sentencing purposes would be 2.38 grams, rather than 34.675 grams. This lower weight would make him eligible for a shorter prison term.

The Eighth Circuit remanded the case to the district court to determine whether the defendant's sentence should be reduced.
C. Marijuana Equivalency Amendment

In 1995, the Commission issued Amendment 516, which adjusted the equivalencies between marijuana plants and the weight of marijuana that should be attributed to each plant. The Guidelines had previously equated offenses involving fifty or more marijuana plants as equivalent to one kilogram of marijuana. For offenses involving fewer than fifty plants, each plant was treated as the equivalent of 100 grams of marijuana. Amendment 516 discarded the one-plant-to-one-kilogram equivalency and treated each plant, irrespective of quantity, as corresponding to 100 grams of marijuana. The Commission adopted the amendment after it determined that "a marihuana [sic] plant does not produce a yield of one kilogram of marihuana [sic]."

In 2007, United States v. Gilliam addressed the propriety of a § 3582(c)(2) motion based upon Amendment 516. There, the defendant had been convicted of, inter alia, conspiracy with intent to distribute marijuana and, when sentenced, had an applicable guideline range of 360 months to life. As a result of the amendment, the defendant's guideline range was lowered to 262 to 327 months. Ultimately, the district court granted the motion and imposed a reduced sentence of 295 months. In support, the court found "that the reasons provided by the United States Sentencing Commission for Amendment 516 are compelling and require a reduction to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

The amendments and cases highlighted above reflect the real-life consequences associated with retroactive amendments issued by the Commission. As noted, the Commission has, on numerous occasions, amended the Guidelines and extended its sentencing adjustments to those already convicted. However, the Commission's authority to extend relief in this fashion could be significantly eroded should a § 3582(c)(2) waiver policy be adopted on a broad scale.

History suggests that this is not a far-fetched possibility. Remember, the government in Freeman sought to exclude an entire...
PLEA BARGAINING

class of convicted criminals—individuals convicted pursuant to a type C plea agreement—from taking advantage of Amendment 706, which alleviated the sentencing disparity between offenses involving crack and powder cocaine. In addition, the government has attempted to foreclose § 3582(c)(2) relief in a number of circuits by arguing that the appellate waiver clauses in the subject plea agreements precluded such motions. Finally, as noted earlier in this Part, at least one circuit has already upheld the government's use in plea agreements of § 3582(c)(2) waivers.

CONCLUSION

Whether Freeman's legacy remains in the shadow of many of the Court's recently decided, higher-profiled criminal procedure cases is still an open jury question. The outcome will depend upon whether the Department of Justice adopts a policy incorporating § 3582(c)(2) waivers into federal plea agreements and whether such a policy is limited or broad in its implementation. In the meantime, as the Commission continues its practice of guideline review and revision, this author hopes that the illuminated real world and contractual realities of the plea bargaining process detailed in this Article will inform the courts as they consider § 3582(c)(2) petitions in the upcoming years. Even if adopted, however, the significance of these lessons and the § 3582(c)(2) review process will be largely mooted should the Department adopt a sweeping waiver policy. Only time will tell what reality will emerge.

181. See supra notes 144–46 and accompanying text.