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NOTE

FALLING THROUGH THE CRACK: HOW COURTS HAVE STRUGGLED TO APPLY THE CRACK AMENDMENT TO "NOMINAL CAREER" AND "PLEA BARGAIN" DEFENDANTS

Maxwell Arlie Halpern Kosman*

In 2007, after a decade of debate, the U.S. Sentencing Commission instituted an amendment that decreased the sentences of some defendants who had been convicted of crack-cocaine-related offenses. A few months later, the Sentencing Commission passed another amendment that rendered it retroactive. Nearly three years after the passage and retroactive application of the "crack amendment," however, two separate circuit splits have emerged as courts have struggled to uniformly interpret and apply the Sentencing Commission’s directives. The first circuit split emerged regarding the eligibility of a subset of "career offenders" to the benefits of the retroactive application of the crack amendment. The second circuit split emerged over the question whether a subset of defendants who pled guilty to crack offenses pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) prior to the passage of the crack amendment are eligible to receive the benefits of its retroactive application.

This Note first argues that the language of the applicable statutes and policy statements and the specific actions taken by the Sentencing Commission indicate that the subset of "career offenders" in the first circuit split are not eligible for a subsequent reduction in the sentence pursuant to the crack amendment. This Note argues, however, that the lack of explicit directives from the Sentencing Commission regarding the "plea bargain" defendants in the second circuit split indicates that these defendants are eligible to receive the benefits of the retroactive application of the amendment. Because the Sentencing Commission instituted and rendered retroactive the crack amendment to decrease the disparity in sentence between defendants convicted of crack and powder cocaine offenses, it would be contrary to the purpose of the amendment to exclude these defendants from its benefits.

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INTRODUCTION

When the "crack amendment" to the Federal Sentencing Guidelines finally took effect on November 1, 2007, it was overdue by any metric. The U.S. Sentencing Commission had been lobbying Congress in vain for ten years to remedy the sentencing disparity between crack and powder cocaine offenses, which caused defendants convicted of crack offenses—who were disproportionately African American—to receive much stiffer punishments than those who were convicted of possessing similar quantities of powder cocaine.

1. According to an overview publication by the commission:

The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.


2. See infra Section I.B.
cocaine. Finally, the commission took action itself and passed the amendment, which assumed legal force after Congress took no affirmative steps to prevent its passage. A few months later, the Sentencing Commission voted to apply the crack amendment retroactively. As expected, the commission members patted themselves on the back for a job well done and the Bush Administration disapproved. However, the fight over the retroactive application of this amendment was far from over. Two-and-a-half years after the amendment was applied retroactively, federal courts are still grappling with its application. Two circuit court splits on the subject have emerged, both of which have profound implications on individual defendants’ sentences.

The first circuit split questions whether a subset of “career-offender” defendants are eligible for a reduction in their sentence pursuant to the crack amendment. While reducing these defendants’ sentences may seem fair, the plain language of the policy statement governing the application of retroactive amendments indicates that these defendants are ineligible for the sentencing reduction. All of the circuit courts that have addressed this question have reached that conclusion except the Second Circuit.

Meanwhile, a more difficult and interesting question has emerged regarding defendants who, prior to the passage of the crack amendment, pled guilty pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) to a sentence that was explicitly calculated in accordance with the pre-amendment Federal Sentencing Guidelines. While many courts have yet to address this question, a majority of circuits have indicated that these defendants are also ineligible for a reduction in sentence.

This Note argues that the exclusion of these plea bargain defendants from the benefits of the crack amendment runs counter to the goals that motivated the amendment’s enactment. Further, the Sentencing Commission’s response to the “career-offender” circuit split provides insight into the commission’s view of the “plea bargain” circuit split. By speaking clearly to

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7. See Stout, supra note 3. (“At its core, this question is one of fairness,” said one commission member, Judge William K. Sessions III of the United States District Court in Vermont. “This is an historic day. This system of justice is, and must always be, colorblind.”).

8. Id. (“The Bush administration restated its opposition to making the lighter sentences retroactive. ‘Our position is clear,’ Attorney General Michael B. Mukasey said Tuesday at a news conference.”).

9. See infra Part II.


11. See infra Part III.
the impact of the crack amendment on career offenders, the commission implicitly instructed judges not to apply the amendment to plea bargain offenders. Part I provides the histories of the federal sentencing system and the crack amendment. Part II then discusses the career-offender circuit split and concludes that the majority of courts are correct in excluding these offenders from the benefits of the crack amendment. Finally, Part III argues that the current majority view in the plea bargain circuit split is, in contrast to the predominant view on the career-offender question, at odds with the intentions of both Congress and the Sentencing Commission.

I. THE HISTORY OF FEDERAL SENTENCING AND THE CRACK AMENDMENT

A. The Federal Sentencing System

This Section provides background on the federal sentencing process. First, it discusses the sentencing mechanics that were in place prior to the Supreme Court's landmark decision in *Booker*. Second, it discusses pertinent aspects of Federal Rule of Criminal Procedure 11, which governs plea bargains in the federal system. These two pieces of background information are essential to an understanding of the two circuit splits: both splits emerged as a result of the strict sentencing mechanics outlined in this Section. Finally, this Section explains the effect that *Booker* has had on the two circuit splits.

The federal sentencing regime, meant to check judges' broad discretion to determine convicted defendants' sentences, has been fraught with controversy since its inception. The Sentencing Reform Act (the "SRA")-the statutory basis for the federal sentencing system—was passed in 1984, but "[t]he guidelines did not become fully operational until 1989 because many of the first guideline cases focused primarily on constitutional challenges to the SRA's entire approach to sentencing reform." In 1989, the Supreme Court determined that the creation of a U.S. Sentencing Commission, intended to promulgate the mandatory federal sentencing structure, was within Congress's constitutional bounds.

The Sentencing Commission set out to establish a framework that met the two seemingly conflicting congressional objectives motivating the sentencing system. First, the commission sought to establish a regime that would "provide certainty and fairness in meeting the purposes of sentencing,

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and avoid] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." Second, however, the commission sought a system that would "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."  

1. **Pre-Booker Sentencing Mechanics**

Under the pre-Booker federal sentencing system, courts took into account the seriousness of the offense and the defendant’s criminal history to establish a sentencing range. More specifically, courts looked to the base offense level assigned to the crime for which the defendant was convicted; the more serious the crime, the higher the base offense level it would carry. This base offense level was then adjusted depending on the specific characteristics of the crime in question; these factors could either increase or decrease the base offense level. Courts could then further adjust the offense level based on various factors, such as "victim-related adjustments, the offender’s role in the offense, and obstruction of justice." Finally, the offense level could be decreased further if the defendant accepted responsibility for his involvement in the crime. In addition to determining an offender’s offense level, courts assigned one of six criminal history statuses to defendants, depending on the nature of any previous convictions and how much time had elapsed since they occurred. The defendant’s “guideline range” was then determined by finding the point at which his sentencing level intersected with his criminal history category on the commission’s sentencing table. A slight sentencing twist applied to defendants deemed by the guidelines to be career offenders. Under USSG § 4B1.1(a), a defendant is a career offender if:

19. Id.
21. “In addition to base offense levels, each offense type typically carries with it a number of specific offense characteristics.” Id. For instance:

One of the specific base offense characteristics for theft (which has a base offense level of 7 if the statutory maximum is 20 years or more) increases the offense level based on the amount of loss involved in the offense. If a theft involved a $6,000 loss, there is to be a 2-level increase to the base offense level, bringing the level up to 9. If a theft involved a $50,000 loss, there is to be a 6-level increase, bringing the total to 13.

Id.
22. Id.
23. Id. “Adjustments are factors that can apply to any offense. Like specific offense characteristics, they increase or decrease the offense level.” Id. They are distinct from the specific offense characteristics. See supra note 21.
(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.2

If a defendant met these criteria, his criminal history category was automatically VI, the highest possible.26

Under the mandatory federal sentencing system, a sentencing judge had to issue a sentence that fell within the calculated range unless he felt that there existed a "circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."27 In such a case, the judge could depart from the otherwise applicable sentencing guideline.

The statute governing sentencing departures imposed procedural restrictions on the ability of sentencing judges to issue departures. The commission felt it had accounted for offense characteristics that were empirically relevant. Thus, it believed that judges would have little opportunity to find that the commission failed to account for "a circumstance of kind or degree"28 that would impact a defendant's sentence.29 Consequently, the statute required that departing judges list specific reasons for rendering a sentence that fell outside the presumptive sentencing range.30 Furthermore, the commission was strict in defining instances in which judges were permitted to depart.31 This ensured that judges adhered to the governing statute and issued departures only in extraordinary circumstances, lest they risk


26. USSG § 4B1.1(b) (2004). Additionally, the career-offender defendant's base offense level was determined by a table found in § 4B1.1, rather than the table otherwise used for noncareer offenders. The table found in § 4B1.1 operated slightly differently than the table used to calculate the sentences of noncareer offenders. For example, the table found in § 2D1.1, which is used to calculate the sentence for noncareer offenders convicted of drug offenses, lists the offense level that corresponds to a specific amount of a specific drug. For instance, prior to Amendment 706, if a defendant were found to possess ten grams of crack cocaine with the intent to distribute, he would receive a base offense level of 26, as dictated by the table. The base level offense in § 4B1.1, conversely, is calculated from the statutory maximum of the offense for which the defendant has been convicted. For example, if a career-offender defendant were found guilty of possessing ten grams of crack cocaine, the sentencing judge would first look to the statutory maximum that the offense carried. In this case, it would be forty years. The judge would then consult the table in § 4B1.1 to determine what offense level the guidelines would require for a career offender who committed an offense that carried a statutory maximum of forty years. Here, it would be level 32.


29. Id. ("[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time.").


reversal on appeal. Finally, the statute mandated that in issuing departures, sentencing judges take into account “sentences prescribed by guidelines applicable to similar offenses and offenders.”

One of the circumstances that most frequently resulted in a downward departure was when a judge found that the application of the career-offender guidelines substantially overstated a defendant’s actual criminal history, which the Sentencing Commission enumerated as an acceptable rationale for a departure. In that case, the judge would need to take into account the sentence that the defendant would have received if his sentence were not determined by the career-offender guidelines but rather by normal sentencing guidelines.

In sum, although the mandatory sentencing system allowed judges to issue “non-guideline” sentences, the substantial restrictions that the Federal Sentencing Guidelines and the manual placed on judicial discretion made departures very rare. During the 2005 fiscal year (the last year in which the guidelines were mandatory), only 4 percent of defendants convicted of drug trafficking offenses received downward departures that were neither initiated by the government, nor based on the defendant’s substantially assisting the government.

The following three examples help illustrate the operation of the mandatory Federal Sentencing Guidelines:

Example 1. Defendant 1 was found guilty of possessing ten grams of crack cocaine with the intent to distribute. He has never before committed any criminal offense. In determining his sentence, the judge first looks to § 2D1.1 in order to determine the base offense level for the crime—in this case, 26. The judge then looks to see if he is eligible for an adjustment in that offense level. Assume that Defendant 1 is not eligible for any of these reductions. The judge determines the defendant’s criminal history level by looking to § 4A1.1. Because Defendant 1 has no criminal record, his offense

32. See USSG § 1A1.1, introductory cmt. (“If the court sentences within the guideline range, an appellate court may [only] review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure.”). This procedural disparity pushed sentencing judges to stay within sentencing guidelines.
34. USSG § 4B1.1.
35. USSG § 4A1.3, p.s. (“If reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.”). According to the Sentencing Commission’s data, in 2001, 12.2 percent of all departures were based on § 4A1.3. Of those departures, 36.9 percent were issued to defendants convicted of drug trafficking offenses. U.S. SENTENCING COMM’N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 47 (2003).
36. USSG § 2D1.1.
38. USSG § 2D1.1 (2004).
level is Level I, the lowest possible. The judge then looks to the sentencing table to find the sentence range that corresponds to a criminal history level of I and an offense level of 26: 63–78 months. Finally, if at this point the judge feels the sentencing guidelines failed to account for circumstances that were present in this case, he can issue a departure.

Example 2. Defendant 2 was also found guilty of possessing ten grams of crack cocaine with the intent to distribute, but unlike Defendant 1, he was convicted of two prior drug offenses. These two drug offenses require that Defendant 2 be treated as a career offender. As a result, the judge, instead of looking to § 2D1.1 to determine the defendant’s base offense level, looks to § 4B1.1 of the guidelines. He first determines the statutory maximum of the offense—forty years. He then turns to the table found in § 4B1.1 to determine the defendant’s base offense level—32. As with Defendant 1, the judge looks to see whether the defendant is eligible for any adjustments in sentence as enumerated by the sentencing guidelines. Once again, assume Defendant 2 is ineligible for any of those adjustments. The judge then determines the defendant’s criminal history level—because this defendant qualifies as a career offender, his offense level is automatically VI, the highest possible one. Looking to the table, the judge determines the defendant’s guideline range given an offense level of 32 and a criminal history level of VI: 210–262 months. At this point, the judge may issue a departure in the limited circumstances discussed above.

Example 3. Like Defendant 2, Defendant 3 was convicted of possessing ten grams of crack cocaine with the intent to distribute, and has two prior drug convictions on his record. But Defendant 3 is lucky: his sentencing judge finds that because the defendant was only a very minor participant in the previous crimes, the sentence dictated by the career-offender guidelines overstates the defendant’s criminal history. In accordance with § 3553(b) and § 4A1.3, the judge issues Defendant 3 a departed sentence. Following the statutory imperative, the judge looks to § 2D1.1 to determine the analogous sentence that the guidelines prescribe for noncareer offenders. As in Example 1, the base offense level for a noncareer offender who is found guilty of distributing ten grams for crack cocaine is 26. The criminal history level of this noncareer-offender defendant is determined by looking to § 4A1.1. Assuming that both of his prior offenses carried a sentence greater than one year, that he was not on parole when he committed the current offense, and that he committed his previous offenses more than two years prior to the commission of this offense, Defendant 3 receives a criminal history level of III. The sentencing table calls for a sentencing range of 78–97 months. By completing these steps, the judge sentences Defendant 3—

40. USSG § 5A1.1.
41. Id.
42. These specific facts carry no relevance other than that they are necessary to calculate the defendant’s criminal history category.
who technically could have qualified as a career offender—to a prison term calculated under the noncareer-offender guidelines.

2. Federal Rule of Criminal Procedure 11 Sentences

Sentences issued under Rule 11 of the Federal Rules of Criminal Procedure (the "Rules") operate a bit differently. Because Rule 11 governs plea agreements, not trial convictions, courts are precluded from participating in the initial discussion between the defendant and the prosecutor. The Rules stipulate that the discussions between the prosecutor and the defendant can result in three mutually exclusive outcomes. First, the agreement "may specify that an attorney for the government will not bring, or will move to dismiss, other charges." Second, the parties can agree that "an attorney for the government will . . . recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply." Third, the parties can 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."

The plea bargain circuit split emerged solely with regard to defendants who reached plea bargains pursuant to Rule 11(c)(1)(C). However, the mechanics of Rule 11(c)(1)(C) are best understood when viewed in contrast to the mechanics of Rule 11(c)(1)(B). The most significant difference between the second and third possibilities is that when a plea agreement is reached under Rule 11(c)(1)(B) (the second possibility), even if the court accepts a plea agreement, it is not bound to the agreed-upon recommendation. Conversely, when a plea agreement is reached under Rule 11(c)(1)(C) (the third possibility), the "recommendation or request binds the court once the court accepts the plea agreement."

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43. Rule 11 was amended in 2002 and again in 2007. Many of the defendants whose sentences are implicated by the discussion in this Note were sentenced prior to one or both of these amendments. The applicable amendments, however, were "intended to be stylistic" and were "not intended to make any change in practice." Fed. R. Crim. P. 11 advisory committee's notes on 2002 amendment. The most significant effect of the changes was the movement of the applicable language from Rule 11(e)(1)(C) to Rule 11(e)(1)(C). For the sake of clarity, this Note refers to the Rules as they are currently organized.

44. Fed. R. Crim. P. 11(c)(1) ("The court must not participate in these discussions.").
45. Id. 11(c)(1)(A).
46. Id. 11(c)(1)(B).
47. Id. 11(c)(1)(C).
48. Id. 11(c)(1)(B).
49. Id. 11(c)(3)(B).
50. Id. 11(c)(1)(C).
As such, the Rules appear to afford more leeway in the imposition of sentences for defendants who plead guilty to an offense than for those who are convicted of the same offense. Rule 11(c)(1)(C) permits the defendant and prosecutor to agree to an "appropriate" sentence. However, it is clear that even in the plea bargain context, the U.S. Sentencing Guidelines play a significant, almost dispositive, role. The guidelines state that in order for a court to accept a Rule 11(c)(1)(C) plea bargain, it must be "satisfied either that the agreed sentence is within the applicable guideline range; or the agreed sentence departs from the applicable guideline range for justifiable reasons." In order to facilitate courts' adherence to this requirement, the Rules state that the court's approval may explicitly be withheld until it has had the opportunity to view the defendant's presentence report, which itself will contain the defendant's recommended guidelines sentence pursuant to the Federal Sentencing Guidelines. Thus, while the guidelines are certainly applied less stringently to defendants who strike plea agreements, they are still the predominant factor in determining a plea bargain defendant's sentence.

3. The Demise of the Mandatory Federal Sentencing Regime

Recent Supreme Court decisions have significantly altered the federal sentencing regime. The first major blow to the mandatory federal sentencing guidelines was dealt by the Supreme Court's decision in Apprendi v. New Jersey. In that case, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Although Apprendi dealt with state-issued sentences rather than the federal guidelines, the decision had major implications for the federal system because judges, not juries, decide many of the sentence-determinant factors involved in the federal guidelines. Following up on Apprendi, the Court held in Blakely v. Washington that, even in mandatory sentencing regimes, the Sixth Amendment requires juries to find those facts that would increase defendants' sentences. The Court in United States v. Booker finally ended the mandatory federal sentencing regime. On review, the Court first held that, because the U.S. Sentencing Guidelines are manda-

52. FED. R. CRIM. P. 11(c)(3)(A).
54. Apprendi, 530 U.S. at 490.
55. Blakely v. Washington, 542 U.S. 296, 303 (2004). Apprendi and Blakely stand for slightly different propositions, though the precise holdings are not significant for the purpose of this Note. The Court held in Apprendi that a jury must find a fact that increases a defendant's sentencing range. Apprendi, 530 U.S. at 466. However, the Court held in Blakely that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303. In other words, any fact that increases the defendant's sentencing range needs to be proved by a jury.
Falling Through the Crack

Consequently, in a second, remedial holding the Court held that 18 U.S.C. § 3553(b), which rendered the guidelines mandatory, should be “severed and excised” from statute. The discretionary sentencing system that took form in Booker’s wake was only nominally different than the pre-Booker system in practice. Booker still required that judges “take account of the Guidelines together with other sentencing goals” in determining a defendant’s sentence. As a result, following Booker, a majority of sentences continued to fall within the now-suggested range.

Perhaps Booker’s most significant impact was the manner in which it altered the mechanics of the federal sentencing system. As discussed in Section I.A.1, prior to Booker, judges first identified a defendant’s offense and criminal history levels, then determined the corresponding sentencing range within the Federal Sentencing Guidelines, and finally sentenced the defendant to a prison term within the range dictated by the guidelines. Further, if a judge wanted to issue a sentence outside of the calculated range, he would have to first state a specific rationale that the Sentencing Commission had not accounted for in promulgating the guidelines, then issue a departed sentence that was consistent with (and very often explicitly based on) other similar guidelines. In effect, this maintained the guise that sentencing judges were required to calculate a defendant’s sentence based on some section of the Sentencing Guidelines.

Booker obliterated the need to maintain the myth that even reduced sentences were still “within the Federal Guidelines.” Instead of issuing “departures,” judges could instead issue variant sentences that simply fell outside of the range the guidelines recommended for the defendant. This is not to suggest that after Booker district court judges have unbridled discretion in sentencing. On the contrary, the guidelines still play a very significant role: a majority of sentences continue to fall in the suggested range four years after Booker was decided. That being said, the fact that judges no longer have to consider other similar guidelines sentences in order to reduce a defendant’s sentence impacts this Note’s discussion of the crack amendment.

57. Id. at 233.
58. Id. at 260.
59. Id. at 224.
60. See Demleitner, supra note 15, at 214 (noting that after Booker, nearly 60 percent of all sentences fell within the guidelines’ range).
61. See id. at 198.
62. See id. at 214.
63. To be clear, with regards to the career-offender circuit split, post-Booker defendants could also be affected in virtually the same manner as pre-Booker defendants. The major point that distinguishes the two classes of defendants is that prior to Booker, judges issuing departures of this nature were required under 18 U.S.C. § 3553(b) to look to the sentence a defendant would have received were the defendant not designated a career offender. Thus, these defendants’ sentences were very often explicitly determined as a result of U.S. Sentencing Guidelines Manual.
B. The Crack Amendment

In 1986, after passage of the SRA but before it became completely effective, Congress passed the Anti-Drug Abuse Act of 1986 ("ADAA"). One ostensible goal of the ADAA was to "reflect society's strong view of the evils of crack cocaine." Most notably, the ADAA established what came to be known as the "100-to-1" ratio between crack and powder cocaine: "An offense involving the mixtures weighing 5 grams or more containing cocaine base was subject to the same punishment as an offense involving mixtures weighing 500 grams or more containing cocaine powder."

This massive disparity was based in part on fear and in part on purportedly scientific underpinnings. On the one hand, some of the impetus for the ADAA was the media's portrayal of crack cocaine as the fuel behind gang violence, which was rampant in the 1980s. In addition to the media's association between crack cocaine and gang violence, crack was perceived by many to be markedly more dangerous than powder cocaine. The American Civil Liberties Union noted in its report on the twenty-year anniversary of the ADAA that the law's "little legislative history" suggested that "Congress believed that crack was more addictive than powder cocaine, that it caused crime, that it caused psychosis and death, that young people were particularly prone to becoming addicted to it, and that crack's low cost and ease of manufacture would lead to even more widespread use of it."

In the years following the ADAA's passage, many of the assumptions justifying the sentencing disparity between crack offenses and powder cocaine offenses were discredited. One study published in the *Journal of the American Medical Association* found that although there are more severe consequences when cocaine is smoked (as crack is) or injected, rather than snorted, "[t]he physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride [powder cocaine] or crack cocaine (cocaine base)." Further, the study concluded that the ADAA's 100-to-1 ratio was excessive.
Besides the fact that there was insufficient scientific evidence supporting the substantial sentencing disparity, there was ample evidence indicating that African Americans—who tended to use crack cocaine more frequently than powder cocaine, relative to other groups—were disproportionately affected by the sentencing disparity between offenses involving the two drugs. To that end, in 2003 African Americans accounted for 80.8 percent of defendants sentenced for federal crack cocaine offenses but only 24.6 percent of defendants sentenced for federal powder cocaine offenses. Because African Americans were disproportionately convicted of crack cocaine offenses and crack cocaine offenses carried much stiffer punishments than did powder cocaine offenses, commentators raised concerns over the possible racially discriminatory effects of this sentencing regime.

These factors placed substantial pressure on Congress to amend the ADAA in order to eliminate, or at least reduce, the 100-to-1 ratio. In 1995, the U.S. Sentencing Commission recommended to Congress that it change the Federal Sentencing Guidelines to replace the 100-to-1 ratio with a 1-to-1 ratio. Congress rejected the proposal, requesting a proposal that would not result in a 1-to-1 ratio. In 2002, the Sentencing Commission again condemned the 100-to-1 ratio. Specifically, the commission found that:

1) the current penalties exaggerate the relative harmfulness of crack cocaine; 2) the current penalties sweep too broadly and apply most often to lower level offenders; 3) the current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; and 4) the current penalties’ severity mostly impacts minorities.

"Tired of waiting for Congress to act," in 2007 the Sentencing Commission passed an amendment to the federal guidelines to reduce the base offense level of crack cocaine offenses, found in of U.S.S.G § 2D.1.1, by two levels. Amendments to the guidelines take effect 180 days after submission to Congress “except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.” As such, when Congress failed to act on the commission’s proposal, the crack amendment took effect. Further, in late 2007, the commission voted to apply the crack amendment retroactively. When Congress again neglected to

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73. VAGINS & MCCURDY, supra note 68, at 1.
76. VAGINS & MCCURDY, supra note 68, at 6 (citing to U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002)).
78. 28 U.S.C. § 994 (2006); see also Stout, supra note 3.
modify or reject the commission's resolution, the crack amendment became retroactive.79

II. THE CAREER-OFFENDER CIRCUIT SPLIT

The federal circuits are split as to whether defendants who were eligible to be sentenced as career criminals under § 4B1.1 but whose sentencing judges departed below the applicable guideline range after finding that the criminal enhancement overstated the defendants' actual criminal history ("nominal career offenders"), are eligible for a reduction in sentence pursuant to the crack amendment. The Second Circuit has held that nominal career offenders are eligible for such a reduction; in contrast, the First, Eighth, and Tenth Circuits have found that they are ineligible. Below, Section II.A discusses the application of the amendment to the U.S. Sentencing Guidelines and provides background on the split. Section II.B explains how the plain language of the Sentencing Commission's policy statement shows that, as the First, Eight, and Tenth Circuits have held, nominal career offenders should be found ineligible for a sentence reduction under the crack amendment. Section II.C concludes that the Sentencing Commission intended to exclude career offenders from the benefits of the crack amendment and explains the commission's probable motivation. Finally, Section II.D discusses the tension between the plain language of 18 U.S.C. § 3582(c)(2) and USSG § 1B1.10(a)(1) and the goals underlying the crack amendment.

A. Applying the Crack Amendment to the Federal Sentencing Guidelines

In passing the crack amendment, all the U.S. Sentencing Commission technically did was amend the drug/offense table found in USSG § 2D.1.1. Sentencing judges use that table to initially determine a defendant's criminal offense level.80 The crack amendment reduced by two a defendant's offense level for possessing a certain quantity of crack cocaine. In current cases, the application of the crack amendment is straightforward: to determine a defendant's base offense level as a starting point, a judge simply looks to the table.

In the case of retroactive sentences, though, the sentencing mechanism is not so straightforward. The statute that governs reduction in sentencing under the Federal Sentencing Guidelines reads, in relevant part:

[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 . . . the court may reduce the term of imprisonment . . . to the extent that [the amendments] are applicable, if such a

80. See Examples 1–3, supra notes 38–42 and accompanying text.
reduction is consistent with the applicable policy statements issued by the Sentencing Commission.81

The policy statement accompanying that provision states that "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 . . . the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2)."82

Despite the somewhat complicated machinery, the statutory language has generally been applied without controversy in cases related to the crack amendment. Courts agree that defendants who were sentenced as career offenders under § 4B1.1 of the Sentencing Guidelines (Defendant 2 in the example above83) are not eligible for a reduction of sentence.84 That is, because these defendants' sentences were not "based on" § 2D1.1, but rather on § 4B1.1—unimpacted by the crack amendment—the language of § 3582(c)(2) excludes these defendants from the benefits of the amendment. Similarly, courts agree that defendants who were strictly sentenced under § 2D1.1 prior to the passage of the crack amendment (Defendant 1 in the example above85) are entitled to a reduction in their sentence commensurate with a two-level reduction in their base offense level. In other words, because these defendants' sentences were "based [solely] on" § 2D1.1—a sentencing range that was amended by the U.S. Sentencing Commission—courts have found that these defendants are eligible for a subsequent reduction in sentence under the crack amendment.

The circuit split centers on defendants who were not clearly sentenced under either § 4B1.1 or § 2D1.1, but rather under a combination of the two (Defendant 3 in the example above86). Recall that the wording of § 3582(c)(2) and the Sentencing Commission’s corresponding policy statement require that relevant defendants’ sentences be “based on” § 2D1.1 in order for them to be eligible for a reduction of their sentence after the crack amendment. Defendants in these cases were eligible to be sentenced under § 4B1.1, and in some sense, § 4B1.1 provided a starting point for the sentencing judge. On the other hand, it is clear that in at least some cases the defendants’ ultimate sentences were determined exclusively by the sentencing ranges found in § 2D1.1.

At first glance, these cases present a perplexing question without a clear answer. As it turns out, however, despite the fairness-based appeal of its

81. 18 U.S.C. § 3582(c)(2) (emphasis added).
83. See supra Section I.A.1.
84. See, e.g., United States v. Thomas, 524 F.3d 889 (8th Cir. 2008) (per curiam); United States v. Sharkey, 543 F.3d 1239 (10th Cir. 2008); United States v. Caraballo, 552 F.3d 6 (1st Cir. 2008).
85. See supra Section I.A.1.
86. See supra Section I.A.1.
argument, the Second Circuit’s decision is not only at odds with the other circuits but also with the plain language of § 3582(c)(2) and § 1B1.10.

B. Courts Should Not Find Nominal Career Offenders Eligible for a Reduction in Sentence Pursuant to the Crack Amendment

According to the plain language of § 3582(c)(2) and § 1B1.10, there is a clear resolution to this seemingly complex issue. Further, the accompanying policy statement, USSG § 1B1.10, states that "[i]n 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 . . . the court may reduce the defendant’s term of imprisonment as provided by 18 U.S.C. 3582(c)(2)." 87

Ultimately, the issue of whether or not nominal career offenders are eligible for sentence reduction pursuant to the crack amendment hinges on whether the “guidelines range applicable to the defendant” discussed in § 1B1.10 is the defendant’s pre-departure or post-departure range. If the “guidelines range applicable to the defendant” is the pre-departure range—for nominal career offenders, the sentence calculated under § 4B1.1—then nominal career offenders are not eligible for a reduction in sentence because the applicable guidelines range will not have been altered by the crack amendment. If, however, the “guidelines range applicable to the defendant” is the post-departure range—for nominal career offenders, the range calculated through reference to § 2D1.1—then nominal career offenders may be eligible for a sentence reduction pursuant to the amendment.

The Second Circuit found in United States v. McGee that the “applicable guidelines range” is the defendants’ post-departure range. 88 The court noted that the language of the statute does “not preclude the possibility that a defendant who was, even if by virtue of a departure, sentenced ‘based on’ the crack guidelines would be eligible for a reduction.” 89 Further, the court noted:

[G]iven that the policy statement is subject to different interpretations and taking account of case law as well as the purposes of the crack amendments, . . . the policy statement would permit a defendant whose post-departure sentence was . . . explicitly based on the crack cocaine guidelines to request a reduced sentence pursuant to Amendment 706 and 18 U.S.C. § 3582(c)(2). 90

The underlying appeal of this holding was the fact that if the amendment had taken place before the defendant had been sentenced, “it is likely that

88. 553 F.3d 225, 228–30 (2d Cir. 2009).
89. McGee, 553 F.3d at 228.
90. Id.
the district court would have given [him] a sentence within the now reduced
guideline range . . . ."91

While the Second Circuit’s reading of the statute and the accompanying
policy statement seems persuasive from a fairness standpoint, it overlooks
the Sentencing Commission’s own definition of a nominal career offender’s
applicable guidelines range. The biggest indication that the commission
intended the “applicable guidelines range” to mean the defendant’s pre-
departure range appears in the definition of “departure” within the manual:

“Departure” means (i) for purposes other than those specified in subdivi-
sion (ii), imposition of a sentence outside the applicable guideline range or
of a sentence that is otherwise different from the guideline sentence; and
(ii) for purposes of § 4A1.3 (Departures Based on Inadequacy of Criminal
History Category), assignment of a criminal history category other than the
otherwise applicable criminal history category, in order to effect a sentence
outside the applicable guideline range.92

In the course of defining “departure,” the commission assumed that a de-
fendant’s “applicable guideline range” was his pre-departure guideline
range. Given that a nominal career offender necessarily received a departure,
it is very hard to imagine that the Sentencing Commission intended the
“applicable guideline range” referenced in the definition of a departure to be
distinct from the “guideline range applicable to the defendant” referenced in
§ 1B1.10. Many other circuit courts have adopted this reasoning, disagree-
ning with the Second Circuit.93

The argument is further bolstered by the sentencing instructions found in
the Federal Sentencing Guidelines, which direct judges to follow a five-step
process:

(1) Determine the defendant’s offense guideline section;
(2) Determine the base offense level and appropriate offense characteris-
tics;
(3) Apply appropriate adjustments related to victim, role, and obstruction
of justice;
(4) Apply the appropriate “acceptance of responsibility” adjustment; and

91. Id. at 227.
92. USSG § 1B1.1 cmt. n.1(E).
93. See United States v. Darton, 595 F.3d 1191, 1196 (10th Cir. 2010) (noting that “[b]ecause
the guidelines ‘effectively define all departures to be outside the “applicable guideline range,”’ an
amendment that lowers only the post-departure sentencing range does not provide a basis for a
defendant’s motion for sentence reduction under § 3582(c)(2)”) (internal citations omitted); United
States v. Tolliver, 570 F.3d 1062, 1066 (8th Cir. 2009) (defining a departure as the “imposition of a
sentence outside the applicable guideline range or of a sentence that is otherwise different from the
guideline sentence”) (quoting USSG § 1B1.1 cmt. n.1(E) (2008)); see also United States v. Cara-
ballo, 552 F.3d 6, 11 (1st Cir. 2008) (applying the same logic to a defendant who was sentenced
after Booker, noting “a variance is granted in the sentencing court’s discretion after the court has
established an appropriately calculated guideline sentencing range. It is that sentencing range that
must be lowered by an amendment in order to engage the gears of section 3582(c)(2)”) (internal
citations omitted).
(5) Determine the defendant's criminal history category, including any applicable career enhancements.94

After that, the manual instructs judges to "[d]etermine the guideline range . . . that corresponds to the offense level and criminal history category determined above,"95 further, the sentencing manual instructs judges to determine "the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution," given the "particular guideline range."96 Finally, it directs judges to look to "Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence,"97 In other words, the sentencing instructions twice mention a defendant's "guideline range" in reference to his pre-departure guideline range.98 Thus, a close inspection of the federal guidelines necessitates the conclusion that the "guidelines range applicable to the defendant" mentioned in § 1B1.10 is a defendant's pre-departure range. Although the Second Circuit approach seems fair, the focus of the other circuits on the plain language of the statute is more persuasive. As such, in accordance with the history and plain language of § 3582(c)(2), nominal career offenders who were convicted of crack offenses prior to the passage of the crack amendment should be ineligible to receive its benefits.

C. The Exclusion of Nominal Career Offenders from the Benefits of the Crack Amendment Was Not an Oversight

The language of the Federal Sentencing Guidelines appears to preclude nominal career offenders from the benefit of retroactive application of the crack amendment. While it does not necessarily follow that this exclusion was thoroughly contemplated, the actions of the Sentencing Commission around the time of the crack amendment's passage reveal that it almost certainly was. The Sentencing Commission's own analysis indicates that it anticipated that nominal career offenders would be excluded from the benefits of the amendment. It further indicates that the commission amended § 1B1.10 so as to eliminate language that could have been interpreted in these defendants' favor.

First, there was a fair amount of hostility toward the idea of rendering the crack amendment retroactive at all, let alone applying it to nominal career offenders. Prior to the retroactive application of the crack amendment

94. USSG § 1B1.1(a)–(f).
95. Id. § 1B1.1(g).
96. Id. § 1B1.1(h).
97. Id. § 1B1.1(i).
98. Tolliver, 570 F.3d at 1065–66; see also Darton, 595 F.3d at 1196.
and in response to a report by the U.S. Sentencing Commission on the implications of such application, the Department of Justice ("DOJ") issued a twelve-page letter urging the commission not to apply the amendment retroactively. One of its main arguments was that if the crack amendment were applied retroactively, "[m]any of the prisoners eligible for immediate release . . . [would] be among the most serious and often violent offenders in the federal system." The DOJ buttressed this point by noting that defendants with the highest criminal offense levels were eligible for the largest potential decrease in the length of sentence. Further, roughly two-thirds of the defendants who would be eligible for a reduced sentence with retroactive application of the crack amendment had a Level III criminal history or greater. The commission's own findings had indicated that defendants with higher offense levels are more likely to reoffend, and the DOJ argued that in rendering the crack amendment retroactive, the commission would be putting the most dangerous crack dealers back on the street. Since the Sentencing Commission had such difficulty passing the crack amendment, there is ample reason to believe the commission feared that, if nominal career offenders were eligible for a reduction in sentence, Congress would not allow the crack amendment to be applied retroactively.

Further, there is evidence that the Sentencing Commission in fact acted on that fear. The first indication that the commission intended to exclude nominal career offenders appears in the legislative history of § 1B1.10. The purpose of § 1B1.10 is to guide judges in reducing defendants' sentences

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101. Id. at 6.

102. Id. at 7. This is because of the nature of the sentencing tables, and because the retroactive sentence reduction applies to those defendants currently incarcerated. Those with longer sentences are naturally more likely to still be in prison than those defendants who, due to lower career guidelines ranges, were given shorter sentences.

103. Id.


105. Letter from Alice Fisher, supra note 100.

106. See supra Section I.B. Again, Congress twice rejected the commission's proposed amendments, and ultimately, Amendment 706 was passed only after the commission acted unilaterally and Congress failed to take action.

107. As was briefly discussed above, after the U.S. Sentencing Commission promulgates an amendment, the amendment can take effect as soon as 180 days later unless Congress affirmatively rejects or modifies the amendment. See supra note 78 and accompanying text. In addition, the statute requires that the commission include "a statement of the reasons" supporting the enactment of the given amendment. 28 U.S.C. § 994(p) (2006). Congress's failure to modify or reject the amendment that resulted in the retroactive application of the initial crack amendment, then, indicates that Congress tacitly approved of its passing. However, because of the guidelines' amendment process, the legislative history is found in the commission's, rather than Congress's, actions.
pursuant to retroactive changes to the guidelines. The commission amended § 1B1.10 to take effect on March 3, 2008—-the same day on which the crack amendment was to become retroactive—and in its amended form, it became decidedly less favorable to nominal career offenders. The pre-amendment policy statement read:

In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced.

Under this formulation, it could be argued that nominal career offenders are eligible for a reduction in sentence under the crack amendment, reasoning that a judge would have imposed on them a lower sentence had the crack amendment been in effect at sentencing. The revised statement, however, states:

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.

This revised formulation is much stronger than the previous iteration. Also, as previously noted, the post-amendment language does away with any ambiguity that could be construed in favor of nominal career offenders.

Finally, the commission's own "Impact Analysis"—-prospectively summarizing the effects of rendering the crack amendment retroactive—seems to indicate that it anticipated that nominal career offenders would not be eligible for a reduction. In that document, the commission discussed the group of currently incarcerated defendants who would be affected by making the crack amendment retroactive. In defining that group, the commission noted that those defendants "whose original final offense level was controlled by the career offender or armed career criminal sections of the guidelines" would be excluded from the benefits of the amendment’s retro-

111. This Note finds the political motivation more compelling than the official explanation, which was simply that the amendment was enacted "to clarify the limitations on the extent to which a court may reduce the defendant’s term of imprisonment." Notice of Final Action Regarding Amendments to Policy Statement § 1B1.10, 73 Fed. Reg. 217, 219 (Jan. 2, 2008). That is, it appears from this history that the commission rightfully feared that if not for steps that would explicitly exclude nominal career offenders from the benefits of the retroactive application of the crack amendment, Congress would not have allowed the retroactive application of the amendment at all.
active application. Although that sentence is slightly ambiguous, it seems that the commission's use of the term "original final offense level," rather than simply "final offense level," indicates the commission anticipated the exclusion of nominal career offenders from the benefits of the retroactive application of the crack amendment.

D. The Exclusion of Nominal Career Offenders Conflicts with the Goals of the Crack Amendment

Although it is contrary to the spirit of the crack amendment to do so, courts can prudently find that nominal career offenders are excluded from the benefits of the amendment. First, such an exclusion would be consistent with the plain language of § 3582(c)(2) and its accompanying policy statement, § 1B1.10. Furthermore, a study of the U.S. Sentencing commission's activity when the amendment was made retroactive indicates that the Commission was not only aware of their exclusion, but that it in fact intended it. In light of this, the Second Circuit's McGee decision is incorrect. And while it appears as though the U.S. Sentencing Commission excluded nominal career offenders from the benefits of the crack amendment in order to ensure that Congress would allow its retroactive application to other defendants, this Note argues that nominal career offenders ought to realize those benefits as well.

The Second Circuit's decision was grounded in a belief in equity. The Sentencing Commission desired that noncareer offenders who were sentenced under the prejudicial guidelines have a remedial recourse. Furthermore, the commission created a mechanism that allowed judges, even during the mandatory sentencing regime, to depart from the career-offender guidelines if the guidelines overstated a defendant's criminal history. Because of the mandatory regime, when the judge departed from those guidelines, he would when possible ground his departed sentence on another guideline. And inevitably in the case of defendants convicted of a crack-cocaine offense, that other guideline would be determined by referencing the table found in § 2D1.1. This was the very table the commission amended to provide recourse to those defendants disadvantaged by the prejudicial gap in sentences between crack and powder cocaine. As a result, these defendants were affected by the fact that crack cocaine offenses carried much higher sentences than those involving powdered cocaine.

Despite this paradox, as the Federal Sentencing Guidelines are presently constructed, these defendants are not entitled to benefit from the very amendment that was enacted to benefit defendants who were disadvantaged by the draconian crack cocaine sentencing guidelines. However, because § 3582(c)(2) and § 1B1.10 do not explicitly exclude some defendants whose sentences were instituted through plea bargains from the benefits of the crack amendments, this line of logic is more persuasive in that context—the focus of the next Part.

112. SCHMITT ET AL., supra note 99, at n.19.
III. THE PLEA BARGAIN CIRCUIT SPLIT

In many respects, the defendants involved in the plea bargain circuit split are similar to the nominal career offenders discussed above. Like the nominal career offenders, it is likely that, had the crack amendment been in place when they were sentenced, these defendants would have received shorter sentences. Like nominal career offenders, a large subset of these defendants are still not eligible for a sentence reduction under the retroactive application of the crack amendment. In contrast, however, a very small subset is eligible and entitled to such a reduction.¹¹³

As discussed in Section II.C, the U.S. Sentencing Commission apparently purposefully excluded nominal career offenders from the benefits of the crack amendment. Furthermore, it appears that the commission's decision to exclude these defendants had a plausible political motivation. However, there is no evidence that Congress intended to exclude plea bargain defendants like the defendant in United States v. Cobb from the benefits of the crack amendment. Furthermore, the DOJ noted, while nominal career offenders are more often serious criminals than noncareer offenders, there is no evidence that this holds true for plea bargain defendants like Mr. Cobb. Given that so many similarly situated, similarly deserving defendants have been arbitrarily precluded from reduced sentences, it is both fair and legally proper that these defendants realize the benefits of the retroactive application of the crack amendment.

A. The Basis of the Circuit Split

As discussed in Section I.A.2, plea bargains enforced through Rule 11(c)(1)(C) are unique in that, if the court accepts the plea bargain agreed upon pursuant to that rule, the court has no discretion to alter the sentence. However, prior to accepting or rejecting the plea deal, a court has the express option of looking at the defendant’s presentencing report in order to determine whether the stipulated sentence is in accordance with (or justifiably different than) the default sentence provided by the federal guidelines.¹¹⁴ Further, Rule 11(c)(1)(C) states that the prosecutor and the defendant may “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.”¹¹⁵ In other words, it is entirely possible—even encouraged—for the parties striking the plea to agree to a sentence explicitly calculated according to guidelines.

¹¹³. The defendant in United States v. Cobb, 584 F.3d 979 (10th Cir. 2009), is representative of this subset. See infra notes 124–127 and accompanying text.

¹¹⁴. The 1998 Federal Guidelines Manual indicates that the court may accept a Rule 11(c)(1)(C) agreement if “(1) the agreed sentence is within the applicable guideline range; or (2) the agreed sentence departs from the applicable guideline range for justifiable reasons.” U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (1998) (amended 2003).

While not all circuits have addressed this question in the context of the crack amendment, there is a strong consensus among one federal appellate camp that when a sentence is determined through Rule 11(c)(1)(C), the district courts lack discretion to reduce the defendant’s sentence pursuant to § 3582(c)(2) absent an explicit agreement between the prosecutor and the defendant to amend the sentence in the event of an amendment to the applicable guidelines range. These courts reason that plea bargains granted under Rule 11(c)(1)(C) are binding on the district court if it chooses to accept it. Further, these courts hold that a Rule 11(c)(1)(C) plea bargain is a contract between the defendant and the prosecutor, a contract that “binds the court once the court accepts the plea agreement.” Thus, these courts hold that “the plain language of the current version of . . . Rule 11(c)(1)(C), generally precludes the district court from altering the parties’ agreed sentence under 18 U.S.C. § 3582(c). This conclusion applies despite the retroactivity of a subsequent amendment to a relevant guideline utilized to determine the defendant’s sentence.”

A second group of circuit courts, also utilizing the contract theory of plea bargaining, is less absolute in its treatment of Rule 11(c)(1)(C) pleas. Similar to those in the first camp, courts in this group hold that a defendant sentenced pursuant to Rule 11(c)(1)(C) may be eligible for a subsequent reduction in sentence only if he makes clear his “intent that his sentence be adjusted in tandem with any future adjustment in the Guidelines.” In accordance with these principles, these courts have held or at least suggested that defendants who reached a plea bargain pursuant to Rule 11(c)(1)(C) with a sentence that fell below their federal guidelines range were barred from arguing that they intended that their sentence be reduced in the event of a subsequent amendment to the sentencing guideline under which they would have been sentenced. None of the courts in this group have found a defendant eligible for a subsequent sentence reduction pursuant to the crack amendment. However, they have held open the possibility that, if a defendant’s plea bargain was calculated under a later-amended

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116. The Third, Fifth, Sixth, and Ninth Circuits.


118. Fed. R. Crim. P. 11(c)(1)(C); see, e.g., Peveler, 359 F.3d at 378–79.

119. Fed. R. Crim. P. 11(c)(1)(C); see, e.g., Peveler, 359 F.3d at 375.

120. Peveler, 359 F.3d at 379.

121. The Second, Seventh, and Eighth Circuits.

122. United States v. Ray, 598 F.3d 407, 411 (7th Cir. 2010); see also United States v. Green, 595 F.3d 432, 438 (2d Cir. 2010) (“In general, plea agreements are construed according to contract law principles.”) (alteration omitted) (quoting United States v. Yemitan, 70 F.3d 746, 747 (2d Cir. 1995)); United States v. Scurlark, 560 F.3d 839, 842 (8th Cir. 2009) (“The circumstances surrounding this Rule 11(c)(1)(C) plea agreement demonstrate the contractual nature of the agreement and the fact that the sentence was not based on a sentencing range that was subsequently lowered.”).
Finally, however, in United States v. Cobb the Tenth Circuit explicitly rejected the contract theory argument and held that the "reasonable interpretation" of § 3582(c)(2) necessitated the conclusion that some Rule 11(c)(1)(C) defendants were eligible for a reduction in sentence under the crack amendment. Specifically, the court noted:

Congress did not intend to keep negotiated plea agreements (even those specifying a particular sentence within a properly computed guideline range) from the reach of § 3582. In § 3582(c)(2), Congress merely used the language "based upon a qualifying sentencing range." The statute imposes no requirement that to be based on a qualifying range, the sentence be a non-negotiated, "run-of-the-mill" guideline sentence. Instead, it generally allows for reductions of sentences which are based in any way on a qualifying range. No other connection is required.

In light of the Tenth Circuit's previous decision in United States v. Trujillo, it is clear that Cobb is restricted to those defendants who were sentenced in accordance with their applicable guidelines range.

B. Cobb Defendants Should Be Eligible for Sentence Reductions Under the Crack Amendment

The Tenth Circuit's holding in Cobb has all of the fairness-based appeal of the Second Circuit's holding in McGee without any of its legal shortcomings. As was the case in McGee, it is exceedingly clear that the defendant's sentence in Cobb was determined exclusively by the Federal Sentencing Guidelines—§ 2D1.1 in particular. As the Cobb court noted, the

123. Ray, 598 F.3d at 410 ("The Tenth Circuit case may arguably be said to have found that the intent of the plea agreement was to tie the sentence to the Guidelines range, which was moved. Such is clearly not the case with respect to [the defendant], whose plea agreement draws no connection between the agreed-to sentence and the relevant Guidelines range."); United States v. Main, 579 F.3d 200, 204 (2d Cir. 2009) ("[W]e need not address whether [Rule 11(c)(1)(C)] should be construed in other cases to bar resentencing pursuant to section 3582(c)(2)." ); Scurlark, 560 F.3d at 842 ("The circumstances surrounding this Rule 11(c)(1)(C) plea agreement demonstrate the contractual nature of the agreement and the fact that the sentence was not based on a sentencing range that was subsequently lowered."). While the Second Circuit itself has not found a plea bargain defendant eligible for a sentence reduction pursuant to the crack amendment, a district court within the Second Circuit has. United States v. Fruster, 669 F. Supp. 2d 341 (W.D.N.Y. 2009).

124. 584 F.3d 979, 985 (10th Cir. 2009).

125. Id. at 985. The Fourth Circuit has made an almost identical finding. See United States v. Dews, 551 F.3d 204, 211 (4th Cir. 2008) ("The statute does not state that a sentence imposed consistent with a plea agreement cannot be 'based on a sentencing range,' nor does it state that the sentencing range must be the sole basis of the sentence. To conclude otherwise would require adding words to the statute, a task in the province of the legislature and not the judiciary."). However, Dews was granted an en banc rehearing and was rendered moot before the rehearing occurred. Id., reh'g en banc granted (Feb. 20, 2009), vacated as moot (May 4, 2009).

126. 100 F.3d 869 (10th Cir. 1996) (finding that a defendant who agreed to a plea bargained sentence below his applicable guidelines range was ineligible for a reduction in sentence pursuant to a retroactive change in his applicable guidelines).

127. See supra notes 88–92 and accompanying text.
Falling Through the Crack

parties “stipulated that sentencing would be ‘determined by application of the sentencing guidelines.’ The agreement also noted that the stipulated sentence of 168 months was ‘the bottom of the applicable guideline range.’” Further, the sentencing court agreed with the parties’ calculations and imposed a sentence of 168 months because it found “there was ‘no reason to depart from the Guideline range.’”

Despite the fact that the defendant’s sentence in Cobb was clearly calculated under § 2D1.1, courts on the other side of the circuit split would more than likely find him ineligible for a sentence reduction pursuant to the crack amendment. The argument would be that because a plea bargain is a contract, both sides make concessions: “Defendants plead guilty in return for important sentencing concessions. Prosecutors make concessions in return for substantial savings in time and energy and the elimination of the risk of acquittal.” By agreeing to a plea bargain (which presumably comes with a lighter sentence), defendants like the one in Cobb negotiate away the option to have “a sentence not based on the Rule 11(e) plea but on a ‘sentencing range,’” absent some express agreement to the contrary.

With regards to defendants who reach a plea agreement below their otherwise applicable guidelines range, this theory makes perfect sense. By accepting a sub-guidelines sentence, these defendants willingly cut the cord between themselves and the sentencing guidelines. Despite the fact that their ultimate sentence likely would have been lower had the crack amendment been in place when they were negotiating the plea bargain, these defendants received a benefit (a sub-guideline sentence) in return for adequate consideration (a waiver of § 3582(c)(2) claims). However, with defendants like the one in Cobb, the contract theory falls apart. Cobb and the prosecutor had agreed that Cobb’s sentence would be determined by the sentencing guidelines—in his case, § 2D1.1. The court applied independent analysis and confirmed that the party’s agreement properly calculated Cobb’s sentence under the applicable sentencing guidelines. Because Cobb was sentenced under the pre-Booker mandatory sentencing framework, he was sentenced to a range within which, absent extraordinary circumstances, the court was obligated to sentence him. It is

128. Cobb, 584 F.3d at 981 (citation omitted).
129. Id. at 981–82.
132. Put another way, for defendants who agree to a sub-guidelines sentence through a plea bargain, the fact that these defendants will be ineligible for a subsequent sentence reduction in the event of an amendment to the applicable guidelines range can be viewed as a default term of their contract. Thus, only an agreement to the contrary would afford them the benefits of subsequent amendments to the sentencing guidelines. See supra note 122 and accompanying text.
133. Cobb, 584 F.3d at 981–82.
134. Id. at 981.
135. See generally supra Section I.A. It is true of course that Cobb was sentenced on the lowest end of the range of sentences he was eligible to receive.
disingenuous to argue that in the process of bargaining for this sentence, Cobb negotiated away the right to argue that his sentence was based on the sentencing guidelines. In contract terms, such a bargain would be illusory.\footnote{136} The courts in \textit{Cobb} and \textit{United States v. Dews} both dismissed the contract theory in favor of a statutory interpretation.\footnote{137} Specifically, those courts noted that Congress made no indication that, for defendants to be eligible for a subsequent reduction in sentence pursuant to § 3582, sentences should be based on “a non-negotiated, ‘run-of-the-mill’ guideline sentence.”\footnote{138} Technically, this is true. However, for circuits with a history of treating sentences arrived at through Rule 11(c)(1)(C) pleas as being “based on” the plea agreement and not the sentencing guidelines, the contractual theory discussed above provides a theoretical justification for making an exception for this small subset of defendants whose negotiated sentences were calculated through and fell within their applicable guideline range.

In light of the Federal Sentencing Commission’s intention in enacting the crack amendment, this theoretical hook should be all that is necessary to justify extending the benefits of the amendment to these defendants. As has been discussed, the crack amendment marked a long-overdue change to a sentencing regime that drastically overpunished crack offenders relative to their peers. Because this area of sentencing law was such a highly politi-

\footnote{136} This argument could also be framed in the manner the Seventh Circuit alluded to in \textit{Ray}. See \textit{United States v. Ray}, 598 F.3d 407, 410 (2010). That is, by agreeing to a sentence calculated by and falling within his applicable guideline range, Cobb implicitly contracted to have his sentence tied to a specific range, thereby making him eligible for a reduction in sentence in the event of an amendment to that range. The theoretical difference between the argument advanced in this Section and the argument advanced in \textit{Ray} is that when a defendant agrees in a plea bargain to a sentence calculated by and falling within the applicable federal guidelines range, this Note treats that defendant’s future eligibility for a subsequent reduction in sentence pursuant to a retroactive amendment of that range as a “default term” of the plea bargain contract. See generally Ian Ayres & Robert Gertner, \textit{Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules}, 99 YALE L.J. 87 (1989) (introducing the theory of penalty defaults and analyzing the concept of default rules generally); Jason Scott Johnston, \textit{Strategic Bargaining and the Economic Theory of Contract Default Rules}, 100 YALE L.J. 615 (1990). With future sentence-reduction eligibility as a default term, the defendant and the prosecutor would have to explicitly agree to alter it for the defendant to be ineligible for such a reduction. See Ayres & Gertner, supra, at 87 (“Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them.”). \textit{Ray} treated all defendants’ ineligibility for such a reduction as a default term. 598 F.3d at 410 (“Only if an intent to modify is apparent at the time of the agreement is the sentence modifiable since the issue is one of contract principle.”). The Seventh Circuit’s dictum implied that defendants who agree to sentences that fall within their applicable guidelines range have intended to tie their sentence to the guidelines. In other words, they contracted around their default ineligibility.

This distinction should prove inconsequential in practice. Regardless of which analysis is applied, the end result is the same, so long as courts using the Seventh Circuit’s framework find that the parties contracted around the default term in all instances in which the defendant was issued a sentence calculated by and falling within his applicable guidelines range.

\footnote{137} \textit{Cobb}, 584 F.3d at 984–85 (“Importing contract ideas into our assessment of § 3582 would hinder adequate consideration of Defendant’s perfectly logical analysis and misdirect our focus from the reasonable interpretation that Congress did not intend to keep negotiated plea agreements (even those specifying a particular sentence within a properly computed guideline range) from the reach of § 3582.”); \textit{United States v. Dews}, 551 F.3d 204, 211 (4th Cir. 2009) (“In this circumstance, there is no reason in principle or in the language of Rule 11(e)(1)(C) that precludes a future application of § 3582(c)(2) in an appropriate case.”).

\footnote{138} \textit{Cobb}, 584 F.3d at 985.
cized realm, however, the Sentencing Commission was forced to make a certain number of concessions, including the exclusion of nominal career offenders from the benefits of the amendment. Unlike the case with nominal career offenders, however, there is nothing in the statutory history that indicates that the sentencing commission intended to exclude defendants receiving § 2D1.1 plea bargain sentences from the benefits of the crack amendment. It is clear that the commission would have been willing to resolve ambiguous language to make its intentions clear. However, with regard to these defendants, the commission took no such action. Therefore, as the Tenth Circuit noted:

Barring [all] defendants who enter Rule 11 pleas from pursuing sentence modifications under § 3582 tends to undermine this general pattern and ignore the pervasiveness of pleas. It also undervalues the role of the guidelines in determining the negotiable range in plea agreements. . . . If we categorically removed Rule 11 pleas from the reach of § 3582, it would perpetuate the very disparity § 3582 and the retroactive application of Amendment 706 were meant to correct. Such an approach would leave defendants who pled guilty before the effective date of the amendment with higher sentences than those who pled guilty afterward because the post-amendment pleas and plea negotiations are based on the lower, modified sentencing ranges. Therefore, all defendants who entered Rule 11 pleas before the effective date of the amendment would be left serving greater sentences on the now-rejected grounds of the 100-to-1 powder-to-crack cocaine ratio.139

Thus, in light of the legal arguments summarized by the Tenth Circuit and the fact that the Federal Sentencing Commission clearly did not contemplate excluding defendants like Cobb from the benefits of the crack amendment, courts should find this subset of defendants eligible for a retroactive reduction in their sentences.

CONCLUSION

In the two years since the crack amendment became retroactive, more than 15,000 defendants have had their sentences reduced pursuant to the change in law.140 These sentence reductions have, on average, shaved more than two years off the sentences of eligible defendants.141 While there still exists a disparity between crack and cocaine sentences under federal law, the disparity is not nearly as egregious as it was prior to the passage of the amendment. But despite the progress that has been made, there are still a number of defendants who ought to be eligible for a sentence reduction in light of these amendment, but who have been largely excluded.

139. Id. at 985.
141. Id. at tbl. 8.
The justifications for excluding nominal career defendants from the benefits of the retroactive crack amendment are fairly sound. These defendants have considerable criminal histories. As a result, they have statistically higher recidivism rates, militating against reducing their sentences. More significantly, nominal career defendants appear to have been purposely excluded from the benefits of the retroactive application of the crack amendment by the Federal Sentencing Commission. Because crack cocaine sentencing has long been such a divisive issue, it looks as though the commission took active steps to ensure that those defendants would not receive the benefits of the amendment. In light of this fact and given the clarity of the statutory language that a majority of courts have interpreted to exclude nominal career offenders from the benefits of amendment, those defendants' exclusion appears neither haphazard nor exceedingly unfair.

However, the exclusion of defendants like Cobb—defendants who received plea bargained sentences that were explicitly and exclusively based on and within the range calculated by the very section of the sentencing guidelines that was the subject of the crack amendment—is unfair and legally unnecessary. The Federal Sentencing Commission made no indication that it intended to exclude these defendants from the benefits of the crack amendment. Further, the existing statutory language, though muddled, certainly permits a reading that would entitle the defendants to these benefits. In light of these facts, excluding this group of defendants from the benefits of the retroactive application of the crack amendment would run counter to the goals of the legislation.