No. 17-155

IN THE
Supreme Court of the United States

ERIK LINDSEY HUGHES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale and the courts of appeals have divided over how to apply Freeman's result.

The questions presented are:

1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.

2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.

3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. Each year, NACDL files numerous briefs as *amicus curiae* in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the represen-tation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Con-

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[1] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Both parties have indicated their consent to the filing of this brief.

stitution. NAFD is a nationwide, non-profit, volunteer organi-zation. Its membership is comprised of attorneys who work for federal public and community defender or-ganizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to pro-mote the fair administration of justice by appearing as amicus curiae in litigation relating to criminal law issues, particularly as those issues affect indigent de-fendants in federal court. Because the attorneys making up NAFD's membership regularly negotiate and enter into plea agreements in federal criminal cases and litigate motions for sentence reductions pursuant to retroactive amendments to the United States Sentencing Guidelines, the NAFD has particu-lar expertise and interest in the issues presented in this case.

SUMMARY OF ARGUMENT

In *Freeman v. United States*, Justice Sotomayor concurred in the majority judgment, holding that a defendant who pleads guilty under Federal Rule of Criminal Procedure 11(c)(1)(C) is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) if the agreement "expressly uses a Guidelines sentencing range to establish the term of imprisonment," or if the agreement "provide[s] for a specific term of imprisonment" and it "is evident from the agreement" that the term is based on the Sentencing Guidelines 564 U.S. 522, 539 (2011). In the wake of *Freeman*, a majority of circuits adopted the concurrence's approach. Unfortunately, in practice, searching Rule 11(c)(1)(C) agreements for proof of the parties' intent inevitably produces unpredictable, inequitable, and inconsistent results.

The results are unpredictable because eligibility for a sentence reduction now turns more on the language used in any jurisdiction's standardized plea template than on the actual intent of the parties. Parties across the country start with prosecutor-drafted documents, some of which cite the relevant Sentencing Guidelines range and criminal history category, and some of which do not. Although a criminal defendant theoretically could negotiate a plea agreement that satisfies the concurrence's test, the reality is that defendants are focused on resolving the criminal charges at issue rather than papering reliance on the Sentencing Guidelines for some distant, contingent possibility like retroactive sentence reduction.

The results are inequitable because the concurrence's test forecloses the availability of a sentence re-

duction in cases where the parties indisputably calculated the sentence "based on" the Guidelines. And vice versa; courts have been forced to consider resentencing even when the full record makes clear that a sentence was not expressly "based on" the Guidelines.

And the results are inconsistent because lower courts have reached divergent outcomes in materially-indistinguishable circumstances due to their confusion about the specificity required by the *Freeman* concurrence. Thus, the same plea agreement can make a defendant eligible for resentencing, or not, depending on where his case is heard.

Rather than looking for meaning where likely none was intended, the Court should take a more practical approach to sentence reductions. Recognizing the reality that plea agreements are always entered by reference to the Sentencing Guidelines, it should adopt a *per se* rule that defendants may take advantage of retroactive changes. That outcome would provide an easily-administrable rule and limit the confusion caused by the 4-1-4 opinions in *Freeman*.

In the past, Justices of this Court have recognized the importance of deriving a sensible, workable rule rather than leaving lower courts without guidance due to a fragmented set of opinions. *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332, 352-54 (2009) (Scalia, J., concurring). And others have concluded that it sometimes makes sense to abandon minority views in favor of a majority rule that most closely accords with them. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 122-24 (2013) (Breyer, J., concurring in part and concurring in the judgment).

If certainty can be a controlling consideration even in some *constitutional* contexts, it is by extension proper in interpreting non-constitutional sources like statutes and Sentencing Guidelines. This is particularly so where the United States Sentencing Commission (or Congress) can always modify the rule if necessary. Criminal defendants should be eligible for sentence reduction whenever the Sentencing Guideline applicable to the conduct to which they pled is amended retroactively.

ARGUMENT

I. The *Freeman* Concurrence Leads to Unpredictable Results Because Parties Rely on the Sentencing Guidelines But Do Not Draft Plea Agreements with Retroactive Resentencing in Mind

The *Freeman* concurrence fails to provide necessary guidance in retroactive Sentencing Guideline situations because it is based on an inaccurate premise. Although the Sentencing Guidelines are always central to plea agreements, the actual agreement itself may not reflect this fact. Plea agreements typically are not negotiated with a view to preserving (or waiving) resentencing in the unlikely future event that an applicable Sentencing Guideline is amended retroactively. Attempting to derive intent where none is documented results in confusion.

A. The Sentencing Guidelines are key to all pleas because prosecutors must make them central to their decisions

As a practical matter, the Sentencing Guidelines frame every aspect of prosecutors' actions, from charging, to plea bargaining, to sentencing. Even after the

Sentencing Guidelines became advisory, *see United States v. Booker*, 543 U.S. 220 (2005), prosecutors use them as the key benchmark or touchstone for predicting and recommending punishment.

The Sentencing Guidelines' influence is evident even in the early stages of a case with initial charging decisions. Prosecutors are instructed that one of the four factors they must balance in selecting charges is that the charge "makes likely the imposition of an appropriate sentence . . . under all the circumstances of the case." U.S. Attorneys' Manual: Principles of Federal Prosecution § 9-27.430 (2017).

Practically, this reference means prosecutors must review the Sentencing Guidelines at charging. In fact, in a guidance issued just weeks after *Booker* was decided, prosecutors were explicitly reminded that they "must consult the Sentencing Guidelines at the charging stage, just as federal judges must consult the Guidelines at sentencing." Memorandum from James B. Comey to All Fed. Prosecutors, Department Policies and Procedures Concerning Sentencing 2 (Jan. 28, 2005) ("Comey Memorandum").

And if the Sentencing Guidelines are important in charging decisions, they take a heightened importance when it comes to making sentencing recommendations. As the Court has recognized, the Sentencing Guidelines remain "the starting point and the initial benchmark" for all sentencing decisions. *Gall v. United States*, 552 U.S. 38, 49 (2007).

Again the U.S. Attorneys' Manual provides clear direction: Prosecutors must "first consider whether a sentence within the advisory sentencing guidelines range" is appropriate in light of the sentencing factors

identified in 18 U.S.C. § 3553, "[t]o avoid unwanted disparities and to further the goal of uniform treatment of similarly situated defendants." U.S. Attorneys' Manual § 9-27.730(C). Prosecutors are to use the Sentencing Guidelines "as a touchstone" because the "appropriate balance of the factors set forth in [18 U.S.C.] § 3553 . . . will continue to be reflected by the applicable guideline range" in most cases. *Id.*, cmt. 1.

Not surprisingly, Attorneys General for decades—regardless of administration—have echoed the guidance that a sentence should almost always fall within the Sentencing Guidelines. Most recently, Attorney General Jeff Sessions reminded prosecutors that "[i]n most cases, recommending a sentence within the advisory guideline range will be appropriate. Recommendations for sentencing departures or variances require supervisory approval, and the reasoning must be documented in the file." Memorandum from Jeff Sessions to All Fed. Prosecutors (May 10, 2017); *see also* Memorandum from Eric H. Holder, Jr., to All Fed. Prosecutors (May 19, 2010) (similar). And earlier guidance is, if anything, more pointed. *See* Comey Memorandum at 2 ("Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases.").

Plea bargaining is similarly anchored by the Sentencing Guidelines. Prosecutors are told that "[t]here are only two types of sentence bargains. . . . First, prosecutors may bargain for a sentence that is within the specified United States Sentencing Commission's guideline range. . . . Second, the prosecutor may seek to depart from the guidelines." U.S. Attorneys' Manual § 9-27.400, cmt. And prosecutors may not drop

readily-provable charges in plea bargaining absent supervisor approval unless "the applicable guideline range from which a sentence may be imposed would be unaffected." *Id.*

B. Defendants use their limited plea leverage to address pressing, current issues

From defendants' perspective, the Sentencing Guidelines are even more important. Yet defendants tend to be concerned with striking plea agreements that limit their immediate downside exposure; future contingencies like retroactive sentence reductions are secondary at best. As a practical matter, therefore, defendants do not expend their limited leverage to negotiate plea agreements that satisfy the *Freeman* concurrence's test. In light of the realities of pleas, it makes little sense to attribute intent about retroactive sentencing to the phrasing of any particular plea agreement.

1. Defendants almost universally plead guilty

The statistical reality is that defendants charged with federal crimes will be convicted in the overwhelming majority of cases. On average, some 91% of defendants charged with a federal crime will be convicted. U.S. Department of Justice, Federal Justice Statistics, 2014 – Statistical Tables, Tbl. 4.2 (2017), *available at* https://www.bjs.gov/content/pub/pdf/fjs14st.pdf.

But the number of convictions tells only part of the story. The overwhelming majority of convictions—approximately 97.5%—resulted from a guilty plea. In the entire United States, only 2.60% of cases charged

are tried, and only 0.42% result in full not guilty verdicts. *Id.* The reality is that "regardless of the prosecutor's stance in any given case, there will almost certainly be a guilty plea. . . . [F]ew defendants can afford to go to trial." Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Ga. L. Rev. 407, 418 (2008).

The high rate of convictions and guilty pleas these statistics reflect are driven by a number of interrelated realities of criminal prosecution. Prosecutors have extraordinary leverage to encourage defendants to take a guilty plea. "[G]iven the array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have more to say about those outcomes than do defense attorneys." William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2558 (2004); *see also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 871 (2009) (noting prosecutor power "to make charging decisions, enter cooperation agreements, accept pleas, and recommend sentences").

Some of that leverage is inherent in the structure of modern criminal law. "With the prevalence of mandatory minimum laws, a prosecutor's decision to bring or not to bring charges can dictate whether a defendant receives a mandatory five-, ten-, or twenty-year term, or whether he or she is sentenced far below that floor." *Id.* at 877. In addition, a criminal defendant who decides to go to trial faces the full range of chargeable conduct, *see Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (recognizing prosecutor power to seek additional or more serious charges if defendants refuse a plea deal).

In addition to the risk of facing enhanced charges, the Sentencing Guidelines also allow prosecutors to offer defendants strong incentives to accept a plea to receive downward sentencing departures for acceptance of responsibility and substantial assistance. United States Sentencing Comm'n, *Guidelines Manual* § 3E1.1 (acceptance of responsibility); *id.* § 5K1.1 (substantial assistance). These incentives can result in significantly reduced sentences. *See* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2122 (2003).

Between prosecutors' ability to "throw the book" at defendants who insist on trial and their power to offer incentives for cooperation, defendants face significant downside risks if they do not plead. In fact, one commentator concluded that "defendants who refuse to waive their right to a jury trial receive an average sentence three times longer than those who plead." Barkow, *Institutional Design*, 61 Stan. L. Rev. at 881. As a result, prosecutors hold virtually all of the cards during the plea bargaining process.

There are, of course, some pressure points that work in defendants' favor. Prosecutors face heavy caseloads and must prioritize which cases receive time and resources. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. at 2554—55; *see also* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L Rev. 50, 54—55 (1968). A defense attorney may be able to use a prosecutor's heavy caseload successfully as leverage. *See* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. 73, 111—12 (1995).

Nevertheless, a defendant's potential leverage points are outweighed in most instances by corresponding defense weaknesses. Some public defenders are also overburdened and unable to credibly threaten to take cases to trial. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2464, 2479 (2004). Even defendants who might initially be able to afford counsel often cannot support the mounting costs of pressing an effective defense. *See* Uphoff, *The Criminal Defense Lawyer*, 2 Clinical L. Rev. at 85. And defendants who are unable to make bail may believe that pleading guilty offers the quickest path home. *Id.* at 85—86. These factors and others mean that "[t]rial looks worse than it really is, and so the plea looks relatively better." Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 Utah L. Rev. 205, 247 (1999).

2. Defendants who plead prioritize current issues over uncertain future eventualities like retroactive Sentencing Guidelines

In most cases, therefore, the question for defendants is not whether they will avoid conviction; it is what penalties will be imposed. "[C]riminals face the choice of accepting a certain loss of liberty or property or taking a risk and going to trial. In the vast majority of cases, defendants accept the certain loss." Birke, *Reconciling Loss Aversion*, 1999 Utah L. Rev. at 207; *see also* Bibas, *Outside the Shadow of Trial*, 117 Harv. L. Rev. at 2496-2519 (discussing competing pressures faced by defendants considering whether to plead). As the Court has recognized, this means that "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost

always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

But the same realities that result in near-universal guilty pleas mean that most defendants facing charges have severely limited negotiating power. Criminal defendants (and defense lawyers) must therefore decide which aspects of a plea bargain to prioritize during plea negotiations.

In assessing what to prioritize, the possibility of retroactive sentence reduction is slight. By their nature, retroactive changes to the Sentencing Guidelines are future, contingent events. Criminal sentences, including sentences imposed pursuant to plea agreements, are generally final. *See* 18 U.S.C. § 3582(b) ("a judgment of conviction that includes . . . a sentence constitutes a final judgment"); *see also* 18 U.S.C. § 3582(c) (court generally "may not modify a term of imprisonment once it has been imposed"). As a result, a defendant who pleads guilty will in most instances never have any argument for resentencing.

The limited exception of a retroactive change in the applicable Sentencing Guideline is doubly contingent on future events outside the defendant's control. *See* 18 U.S.C. § 3582(c)(2). The United States Sentencing Commission has the responsibility for promulgating amendments as warranted. *See* 28 U.S.C. § 994(o). But such amendments generally "will be given prospective application only." U.S. Sent. Comm'n, Rules of Prac. & Proc. Rule 4.1A, https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

In order for an amendment to have retroactive effect, Rule 4.1A requires additional process. The Commission must (1) agree to request public comment on retroactivity; (2) instruct staff to prepare a retroactivity analysis and make it available to Congress and the public; (3) hold a public hearing about retroactivity; and (4) take a public vote on retroactivity at least 60 calendar days before the effective date. *Id.*

In other words, "[a] court's [resentencing] power under § 3582(c)(2) . . . depends in the first instance on the Commission's decision not just to amend the Guidelines but to make the amendment retroactive." *Dillon v. United States*, 560 U.S. 817, 826 (2010). Any defendant who is incentivized to reach a plea agreement is unlikely to use his limited negotiating capital for a provision in the agreement that relies on two separate, subsequent, and future decisions by a third party.

C. Rule 11(c)(1)(C) plea agreements differ by jurisdiction

The *Freeman* concurrence applies a uniform rule for 18 U.S.C. § 3582(c)(2) sentence reductions in all cases involving Rule 11(c)(1)(C) plea agreements. But it ignores the reality that there is nothing like a standard template for plea agreements among the various U.S. Attorneys' Offices, either in general or for Rule 11(c)(1)(C) plea agreements. Parties across the country start with prosecutor-drafted documents that vary by district (and potentially even by prosecutor) and then negotiate terms from there. This fact means that the application of *Freeman* depends in the first instance on the happenstance of geography.

A sampling of Rule 11(c)(1)(C) plea agreements across the country illustrates the degree to which they diverge from each other. Some plea agreements meticulously cite relevant portions of the Sentencing Guidelines and criminal history in explanation of a plea, while others fail to mention them altogether. Still others fall somewhere along the spectrum. The end result is that defendants' successes or failures when seeking retroactive sentence reductions under *Freeman* at some later date depend largely on the specificity of the plea template for that jurisdiction. Ultimately, this means that defendants may obtain (or be denied) retroactive resentencing under *Freeman* simply because of where they are located.

First, some plea agreements lay out a full calculation, citing the corresponding Sentencing Guideline for each factor relevant to the sentence and providing a criminal history score. For example, a plea agreement entered in a prosecution for possession of heroin with intent to distribute in the Western District of New York explicitly cited the Sentencing Guidelines for each offense characteristic. Plea Agreement at 4-5, *United States v. Brooks*, No. 6:15-CR-6157 (W.D.N.Y. Nov. 17, 2017), ECF No. 119. It listed the requisite offense level adjustments for possessing a firearm and maintaining premises to manufacture or distribute a controlled substance. *Id.* It cited the Sentencing Guidelines relevant to defendant's criminal history level and acceptance of responsibility. *Id.* Based on these factors, it calculated a sentencing range of 41 to 51 months and ultimately recommended a sentence of 51 months, at the top of that range. *Id.* at 5. The plea was structured throughout by reference to the Sentencing Guidelines. In plea agreements like

this, there should be no doubt that the sentences adopted by the court are "based on" the Guidelines.[2]

At the other end of the spectrum, some Rule 11(c)(1)(C) plea agreements say little, if anything, about the Sentencing Guidelines considerations that inform the sentencing stipulation the parties have reached. These pleas simply state that the parties consider the sentence "appropriate" given the facts, sometimes with a reference to acceptance of responsibility.

For example, a Rule 11(c)(1)(C) plea agreement for distribution of fentanyl resulting in serious bodily injury in the Eastern District of Kentucky recommended a sentence of 300 months imprisonment, 15 years of supervised release, and $100 in special assessment. *See* Plea Agreement at 3, *United States v. Dudley*, 15-CR-34 (E.D. Ky. Oct. 27, 2016), ECF No. 180. The plea agreement provided no explanation of how the parties reached the calculation. In agreements like this, it is likely that a court applying the *Freeman* concurrence would conclude that retroactive sentence reduction was unavailable if the applicable Sentencing Guidelines were to change.[3]

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[2] *See also* Plea Agreement, *United States v. Burns*, No. 17-CR-60 (C.D. Cal. Feb 2, 2017), ECF No. 8; Plea Agreement, *United States v. Blackshell*, No. 17-CR-6133 (W.D. N.Y. Nov. 3, 2017), ECF No. 34; Plea Agreement, *United States v. Feiten*, No. 15-CR-20631 (E.D. Mich. May 25, 2016), ECF No. 35; Plea Agreement, *United States v. Hopson*, No. 12-CR-444 (D. Colo. Sept. 29, 2014), ECF No. 115; Plea Agreement, *United States v. Shields*, No. 16-CR-12 (E.D. Wash. May 24, 2016), ECF No. 43.

[3] *See also* Plea Agreement, *United States v. Gray*, No. 15-CR-58 (E.D. Tex. July 8, 2016), ECF No. 185; Plea Agreement, *United States v. Harper*, No. 15-CR-155 (D. Kan. Mar. 9, 2016),

Still other plea agreements fall somewhere in the middle of this spectrum, spelling out only some of the Sentencing Guidelines considerations or doing so in general terms only. Some include complete calculations of the Sentencing Guidelines offense level but lack a criminal history score to be complete. For instance, the Rule 11(c)(1)(C) plea in *United States v. Garcia* provided a specific, agreed Sentencing Guidelines calculation resulting in a total offense level of 19. Plea Agreement at ¶12, *United States v. Garcia*, No. 13-CR-462 (C.D. Cal. July 3, 2013), ECF No. 13. The agreement did not, however, provide a criminal history score or a specific sentence or range; instead the parties agreed that the court would calculate criminal history and agreed to sentencing at the bottom of the resulting Sentencing Guidelines range. *Id.* at ¶13. Still other agreements provide a full offense level calculation but no criminal history score, yet then provide a recommended sentencing range or term.[4]

ECF No. 28; *United States v. Peters*, No. 16-CR-315 (D. Neb. Nov. 8, 2016), ECF No. 9; Plea Agreement, *United States v. Portorreal*, No. 16-CR-210 (E.D. Va. Oct. 20, 2016), ECF No. 18; Plea Agreement, *United States v. Wrightsell*, No. 16-CR-3036 (D. Neb. June 1, 2017), ECF No. 28.

[4] *See* Plea Agreement at 4-6, *United States v. Biddy*, No. 17-CR-40011 (D. Mass. May 16, 2017), ECF No. 31 (providing offense level calculation but not criminal history and recommending range); Plea Agreement at 3-4, *United States v. Cornwell*, No. 16-MJ-29 (W.D. Ky. July 19, 2016), ECF No. 14 (same; recommended term); Plea Agreement at 6-8, *United States v. Cuff*, No. 15-CR-110 (E.D. Wash. Oct. 28, 2015), ECF No. 16 (same; recommended range); Plea Agreement at 2-3, *United States v. Molina*, No. 17-CR-40012 (D. Mass. April 26, 2017), ECF No. 7 (same; recommended term); No. 6 (same; recommended term); Plea Agreement at 2-3, *United States v. Rafal*, No. 17-CR-10004 (D.

And then there are agreements that state that the parties considered the Sentencing Guidelines in some fashion, including citations to the Sentencing Guidelines in other portions of the agreement or stating that the Sentencing Guidelines apply generally. But they do not explicitly calculate an offense level or tie it to the recommended sentence.

For example, in *United States v. Marple* the parties entered a Rule 11(c)(1)(C) plea agreement for distribution of heroin and aiding and abetting. Plea Agreement at 1, *United States v. Marple*, No. 14-CR-35 (W.D. Va. Feb. 11, 2015) ECF No. 47. The agreement recommended a 114-month sentence. *Id.* at 3. It noted that the "2014 edition of the United States Sentencing Guidelines Manual applies to any guideline calculations made of [defendant's] conduct." *Id.* However, when providing the recommended sentence, the agreement did not cite specific Sentencing Guidelines in support. Rather, it merely stated the sentence was a "reasonable sentence under all the facts and circumstances of this case." *Id.* at 2.[5]

Mass. Nov. 29, 2016), ECF No. 6 (same; recommended term); Plea Agreement at 6-8, *United States v. Slatt*, No. 16-CR-51 (E.D. Wash. Nov. 9, 2016), ECF No. 51 (same; recommended term).

[5] *See also* Plea Agreement at 2, 5-6, *United States v. Anderson*, No. 16-CR-33 (M.D. Ga. Aug. 23, 2017) (general agreement Sentencing Guidelines apply, acceptance of responsibility, and recommended term); Plea Agreement at 7-8, 10, *United States v. Baldwin*, No. 13-CR-248 (M.D. Pa. Sept. 29, 2014), ECF No. 33 (general agreement Sentencing Guidelines apply, acceptance of responsibility, and recommended term); Plea Agreement at 3-4, *United States v. Clements*, No. 14-CR-21 (W.D. Va. May 21, 2014), ECF No. 29 (general agreement Sentencing Guidelines apply, partial offense level calculation, and recommended range); Plea Agreement at 1, 5-6, *United States v.*

In sum, Rule 11(c)(1)(C) plea agreements exhibit a spectrum of specificity in their reliance on the Sentencing Guidelines. Some are chapter-and-verse recitations of the parties' agreement that show the work done; others provide half the calculation, and still others simply give the sentencing conclusion with little else. There is nothing approaching standardization.

D. Variations in plea agreements lead to different resentencing outcomes for similarly-situated defendants

The diversity of approaches used in different plea agreements has real-world consequences for applying *Freeman*. Defendants charged with similar crimes in different jurisdictions have entirely different plea agreements that could impact their chances of receiving retroactive resentencing if their applicable Sentencing Guidelines changed.

For example, compare the plea agreements in *United States v. Brooks* and *United States v. Marple*. Both defendants were charged under 21 U.S. § 841(a), Brooks for possession of heroin with intent to distribute and Marple for distribution of heroin. *See* Plea Agreement at 4-5, *Brooks*, No. 6:15-CR-6157; Plea Agreement at 1, *Marple*, No. 14-CR-35. However, the *Brooks* Rule 11(c)(1)(C) plea agreement drafted in the Western District of New York directly cites the Sentencing Guidelines in support of the recommended sentence. Plea Agreement at 4-5, *Brooks*, No. 6:15-CR-6157. In contrast, the *Marple* Rule 11(c)(1)(C) plea agreement, from the Western District of Virginia

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Fackrell, No. 12-CR-33 (M.D. Pa. Feb. 15, 2012), ECF No. 3 (general agreement Sentencing Guidelines apply, acceptance of responsibility, and recommended range).

states that the Sentencing Guidelines apply generally but does not detail whether the recommended sentence was calculated using them. Plea Agreement at 1, *Marple*, No. 14-CR-35.

Similarly, compare *United States v. Dudley* and *United States v. Espola*. Both defendants were charged under 21 U.S. § 841(a) for the distribution of Schedule II controlled substances, and both entered Rule 11(c)(1)(C) pleas. *See* Plea Agreement at 3, *Dudley*, No. 15-CR-34 (E.D. Ky. Oct. 27, 2016) ECF No. 180; Plea Agreement at 2, *United States v. Espola*, No. 17-CR-40023 (D. Mass. May 17, 2017). The plea agreement in *Dudley*, from the Eastern District of Kentucky, does not mention the Sentencing Guidelines at all. Plea Agreement at 3, *Dudley*, No. 15-CR-34. In contrast, Espola's plea agreement, from the District of Massachusetts, specifically cites the base offense level from the Sentencing Guidelines, though it does not include a criminal history score. Plea Agreement at 2, *Espola*, 17-CR-40023.

It is, of course, possible that the distinctions between different plea agreements were the result of negotiations between the parties. But there is no indication that such negotiations account for the distinctions between plea agreements in various jurisdictions. The reality is that each jurisdiction tends to have a boilerplate style of Rule 11(c)(1)(C) plea agreement, and parties' negotiations take place against the backdrop of standard local practice. *Compare, e.g.*, Plea Agreement, *United States v. Biddy*, No. 17-CR-40011 (D. Mass. May 16, 2017) ECF No. 31, *with* Plea

Agreement, *Espola*, No. 17-CR-40023 (similar language throughout both Rule 11(c)(1)(C) pleas).[6] These similarities suggest that attributing significance to the wording of a particular Rule 11(c)(1)(C) plea is actually penalizing or rewarding defendants for the form of the document that they happen to sign. Eligibility for resentencing should not turn on the quirk of which template a particular office or prosecutor happens to use.

II. The *Freeman* Concurrence Leads to Inequitable Results Because Eligibility for Resentencing Does Not Necessarily Reflect the Parties' Actual Intent

Another challenge with the *Freeman* concurrence is that it examines only the language of the plea agreement. Courts must therefore disregard oral statements made at sentencing, even when such statements may provide near-definitive evidence that the agreement was (or was not) *actually* "based on" the Sentencing Guidelines. As a result, even those courts that have attempted to apply the *Freeman* concurrence's rule faithfully recognize that it can lead to incorrect results.

The Seventh Circuit's decision in *United States v. Dixon*, 687 F.3d 356 (7th Cir. 2012), is a particularly direct example. During the Rule 11(c)(1)(C) plea col-

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[6] *Compare also, e.g.*, Plea Agreement, *Burns*, No. 17-CR-60, *with* Plea Agreement, *Garcia*, No. 13-CR-462 (similar base documents); Plea Agreement, *Slatt*, No. 16-CR-51, *with* Plea Agreement, *Cuff*, No. 15-CR-110 (similar base documents, even though child pornography and illegal firearms dealing at issue are very different).

loquy, the prosecutor identified the applicable Guideline range for the court and explained that the proposed sentence was one-half to two-thirds of the low end of that range. *Id.* at 360. But in subsequent proceedings regarding retroactive application of an amended Sentencing Guideline, the Court determined that it could not consider the prosecutor's statements because they were oral and not reflected in the plea agreement. *Id.* at 361.

The Seventh Circuit strongly questioned this result. It stated that "[i]t is hard to believe that [the prosecutor's] assurances were not relevant, perhaps even decisive, in the judge's decision to accept the binding plea agreement." *Id.* It recognized that "[i]f the written agreement itself had said what the prosecutor told the court . . . the district court could have exercised its discretion to decide to grant or deny" resentencing. *Id.* at 360-61. Yet, the *Freeman* concurrence compelled it to conclude that the sentence was not "based on" the Guidelines.

In a similar case from the Sixth Circuit, the prosecutor orally specified the defendant's offense level, criminal history category, and the applicable Guideline range for the court, explaining that the agreed Rule 11(c)(1)(C) sentence reflected a three level reduction for acceptance of responsibility and assisting law enforcement. *United States v. McNeese*, 819 F.3d 922, 925 (6th Cir. 2016).

The Sixth Circuit recognized that "the prosecutor's remarks at the sentencing hearing–together with the pre-sentence report . . . make clear that by the end of the sentencing hearing, McNeese, the government, and the district court all understood that the agreed-upon sentence did in fact derive from a Guidelines

sentencing range." *McNeese*, 819 F.3d at 929. However, since the plea agreement itself did not reflect this clear understanding, the Sixth Circuit held that the defendant was ineligible for a sentence reduction. *Id.* at 930.

These are not isolated results. *See also, e.g.*, *United States v. Castenada*, No. 2:13-CR-74, 2017 WL 5178785 at *4 (E.D. Tenn. Nov. 7, 2017) (parties agreed on Guideline range and discussed the criminal history category at sentencing; sentence reduction nevertheless denied because statements not in plea agreement); *United States v. Williams*, No. 2:13-CR-34, 2017 WL 5178755 at *2, 4 (E.D. Tenn. Nov. 7, 2017) ("[h]ow the Court was to get from level 28 to a sentence of 90 months was certainly clear after receiving the PSR and hearing the arguments of counsel at the sentencing hearing," but refusing sentence reduction because plea was not "based on" Sentencing Guidelines); *United States v. Heard*, 859 F. Supp. 2d 97, 101 (D.D.C. 2012) (same; Sentencing Guidelines ranges discussed); *United States v. Williams*, No. ELH-11-0258, 2016 WL 3676144 at *2-3 (D. Md. July 7, 2016) (same; noting prohibition on considering express prosecutor statement that plea was for low end of Sentencing Guideline range). Courts applying the *Freeman* concurrence sometimes have to close their eyes to the reality of what the parties actually intended.

And the *Freeman* concurrence does not only lead to defendants being denied resentencing in spite of clear evidence that they are eligible to receive it. Courts have also been forced to consider whether to *grant* a sentence reduction even when the full record made clear that a sentence was *not* expressly "based on" the Sentencing Guidelines. In *United States v. McCall*,

for instance, both parties agreed at sentencing that they miscalculated the Sentencing Guideline range included in the Rule 11(c)(1)(C) plea agreement. 649 F. App'x 114 (2d Cir. 2016). The plea's proposed sentence was 108 months, but the correct Sentencing Guideline range should have been 121-151 months. *Id.* at 116.

Nevertheless, the district court accepted the plea, concluding that it was "a reasonable sentence, even though it's not a guideline sentence." *Id.* However, on the defendant's subsequent motion to reduce his sentence, the same defendant received relief because the plea contained a Sentencing Guideline calculation, even though that calculation was undisputedly incorrect and was not the basis for the sentence imposed. As the Sixth Circuit explained, "[n]otwithstanding the court's decision to sentence McCall based on an erroneous Guidelines calculation . . . *Freeman* requires him to be resentenced." *McCall*, 649 F. App'x at 116.

A similarly odd outcome occurred in *United States v. George*, where the parties calculated a higher-than-warranted Sentencing Guideline range and included it in the plea. *United States v. George*, 664 F. App'x 465, 467 (6th Cir. 2016). The defense attorney noted at sentencing that the parties had "bargained for a sentence . . . not for a Guideline range." *Id.* Notwithstanding that disclaimer, the defendant later was held eligible for a sentence reduction because the (erroneous) Sentencing Guideline calculation was included in the plea agreement. *See also United States v. Smith*, 658 F.3d 608, 612-13 (6th Cir. 2011) (defendant eligible for sentence reduction where complete guidelines worksheet attached to plea agreement, even though defense attorney at sentencing stated that sentence

was not based on sentencing guidelines). These cases illustrate that defendants whose sentences were not actually "based on" the Sentencing Guidelines nevertheless have been deemed eligible for a sentence reduction under a faithful application of the concurring opinion in *Freeman*.

In sum, because courts applying the *Freeman* concurrence may look only to the four corners of the plea agreement, they can be forced to make sentence reduction eligibility decisions that do not reflect reality. In this way, *Freeman* is both over- and under-inclusive. Some defendants whose pleas actually were "based on" the Sentencing Guidelines are not eligible for a sentence reduction under *Freeman*, while some defendants whose pleas were not "based on" the Sentencing Guidelines are treated as if they were.

III. The *Freeman* Concurrence Leads to Inconsistent Results for Defendants with Similar Plea Agreements Because There is Confusion About the Level of Specificity Required

The *Freeman* concurrence also leads to inconsistent determinations regarding eligibility for a retroactive sentence reduction because defendants with similar plea agreements can receive different relief based on the court in which their case was heard.

There is confusion about the specificity required in a plea agreement in order for the *Freeman* concurrence to allow resentencing. For instance, the Sixth Circuit requires the Sentencing Guideline range to be "*explicitly* referenced" in the plea agreement. *McNeese*, 819 F.3d at 927. The Seventh Circuit similarly explains that the plea agreement must refer to

and rely on or "expressly use" a Sentencing Guideline range. *Dixon*, 687 F.3d at 360.

Other courts, however, appear less demanding. The Third Circuit allows sentence reductions if the plea agreement contains the "necessary ingredients" to calculate the defendant's Guideline range, even if that range is not explicitly expressed. *United States v. Weatherspoon*, 696 F.3d 416, 424 (3d Cir. 2012). The First and Tenth Circuits also accept this inferential approach. *See United States v. Jordan*, 853 F.3d 1334, 1340 (10th Cir. 2017) (plea agreement need not specify the Guideline range and can instead call for a specific term of imprisonment); *United States v. Rivera-Martinez*, 665 F.3d 344, 349 (1st Cir. 2011) (same).

These different approaches matter. For example, two Rule 11(c)(1)(C) plea agreements that expressly stated that the Sentencing Guidelines applied, included the defendant's offense level, and stipulated a specific term of imprisonment had different outcomes in different jurisdictions. *Compare United States v. Adams*, No. 6:11-CR-00040-GFVT-HAI-1, 2017 WL 3701444 at *3 (E.D. Ky. Aug. 28, 2017), *with Williams*, 2016 WL 3676144 at *5. Both plea agreements also included express disclaimers that there was no agreement about the defendant's criminal history category. *See Adams*, 2017 WL 3701444 at *3; *Williams*, 2016 WL 3676144 at *1, 4.

The *Adams* court held the defendant ineligible for a sentence reduction because there was no calculation of the applicable Guideline range or criminal history score in the plea. *See* 2017 WL 3701444 at *3-4. The *Williams* court, however, ascribed significance to the plea agreement's statement that the "'Advisory Sentencing Guidelines Apply'" and inferred from the

agreed-upon sentence that the parties must have assumed a criminal history category of I. *See* 2016 WL 3676144 at *5 ("it certainly appears that the parties anticipated the criminal history category of I"). The court therefore allowed a sentence reduction.

The defendant in *United States v. Graham* was similarly fortunate to be in Massachusetts instead of somewhere else. 869 F. Supp. 2d 208 (D. Mass. 2012). The defendant was initially subject to a mandatory minimum of 60 months, but the government filed an information that would have carried a mandatory minimum of 120 months. *Id.* at 210. The Rule 11(c)(1)(C) plea agreement reflected both minimums and a government agreement to withdraw the information in return for an agreed 90-month sentence. *Id.* It did not, however, expressly specify how the parties reached 90 months. *Id.*

The court nevertheless held the defendant eligible for a sentence reduction when the relevant Sentencing Guidelines changed. It recognized that "the process appeared transparently Solomonic: the parties halved the difference." *Id.* Under those circumstances, the court concluded that it was "abundantly clear from the four corners of the document" that "the agreement simply split the difference" between the two potential Sentencing Guidelines terms. *Id.* at 214.

But that inferential approach appears improper under, for instance, either *Dixon*, 687 F.3d at 360, or *McNeese*, 819 F.3d at 928 ("It is surely possible that one could guess" what sentencing range applied but rejecting the invitation to do so). Either of those courts would have denied resentencing because an inference was required.

Uncertainty about the *Freeman* concurrence has led courts to adopt different requirements for defendants' plea agreements. The consequence of these varied approaches is that the principal factor determining whether a defendant qualifies for retroactive sentence reduction may not actually be whether the agreement was "based on" the sentencing Guidelines. This variation results in inconsistent outcomes based on the geographic happenstance of the approach taken by a particular court.

IV. *Freeman* Should Be Modified to Provide a Clear, Administrable Rule

Rather than attempting to discern intent from the four corners of a plea agreement or even from the record as a whole, the Court should modify *Freeman* to provide a clear, administrable rule. Such a rule should recognize the practical reality that *all* federal plea agreements are influenced by and based on the Sentencing Guidelines. The practical need to avoid confusion has caused Justices in similar instances to adopt easy-to-apply rules, and criminal resentencing should be no different. In fact, the Sentencing Guidelines are particularly appropriate for a rule that allows resentencing, since the United States Sentencing Commission (or Congress, for that matter) can always provide that a particular Sentencing Guideline change is not appropriate for retroactive application.

A. Justices have recognized the importance of clear, administrable rules rather than creating 4-1-4 split decisions

There is nothing unusual about the Court prioritizing the creation of a clear, administrable rule over a split decision that will continue to cause confusion in

the lower courts. In other cases Justices of the Court have recognized the need to provide clear guidance by adopting clear rules, even in constitutional decisions when they would have preferred a different outcome.

For instance, in *Arizona v. Gant*, the Court addressed ongoing confusion regarding the circumstances under which police officers could conduct a warrantless search of a vehicle incident to arrest of its occupant. 556 U.S. at 335. Justice Stevens wrote the majority opinion for five Justices, clarifying several prior cases to explain that the Fourth Amendment allows such a search "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351.

Justice Scalia provided the fifth vote for that majority opinion. *See id.* at 354 (Scalia, J., concurring) ("I . . . join the opinion of the Court."). Critically, he did not believe that Justice Stevens' opinion stated the right rule for Fourth Amendment purposes. *Id.* at 352. Instead, he would have preferred a rule limited to Justice Stevens' second exception for evidence of the offense of arrest. *Id.* at 353 ("I would hold that a vehicle search incident to arrest is *ipso facto* 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.").

Nevertheless, Justice Scalia recognized that "[n]o other Justice . . . shares my view." *Id.* at 354. That fact left the Court facing the prospect of a "4–to–1–to–4 opinion that leaves the governing rule uncertain," a result that Justice Scalia termed "unacceptable." *Id.*

Rather than leave lower courts without guidance (as well as citizens and police officers literally standing by the side of the road), Justice Scalia adopted what he saw as the lesser evil: He provided the fifth vote to Justice Stevens' opinion. *Id.*

Nor is Justice Scalia alone. Just a few years later, Justice Breyer provided the fifth vote in *Alleyne v. United States*, 570 U.S. 99, to overturn a prior case, *Harris v. United States*, 536 U.S. 545 (2002), that had allowed judicial factfinding to increase mandatory minimum sentences for crimes in spite of Sixth Amendment concerns. *See Alleyne*, 570 U.S. at 117.

Although Justice Breyer dissented in the underlying case of *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting), which required any fact (other than recidivism) that increased the penalty for a crime to be found by a jury, *id.* at 490 (maj. op.), he nevertheless believed that it was "highly anomalous" to apply *Apprendi* to prohibit judicial factfinding that *raised* the maximum sentence while nevertheless allowing judicial factfinding that imposed a mandatory minimum sentence. *See Alleyne*, 570 U.S. at 122-23 (Breyer, J., concurring in part and concurring in the judgment).

Like Justice Scalia in *Gant*, Justice Breyer explained that his "minority views" should give way to the need for consistency. *Id.* at 123. But pragmatism was not his only reason. Justice Breyer also looked back to the policies animating the Sixth Amendment concerns at issue and concluded that the majority better accounted for them than the dissent. *Id.* (rejecting the dissent's characterization of the Sixth Amendment "as simply seeking to prevent 'judicial overreaching'" in sentencing as insufficient because of the

additional concern of protecting "defendants against 'the wishes and opinions of the government' as well").

And more broadly, a number of Supreme Court Justices have recognized the propriety of revisiting their initial views of an issue after the opportunity for further reflection. *See, e.g.*, *United States v. Gooding*, 25 U.S. 460, 478 (1827) (Story, J.); *Massachussetts v. United States*, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting); *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting); *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring in the judgment) (quoting Frankfurter's *Henslee* dissent); *Watson v. United States*, 552 U.S. 74, 84 (2007) (Ginsburg, J., concurring in the judgment) (same); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2793 n.11 (2014) (Ginsburg, J., dissenting) (quoting Jackson's *Mass* dissent); *Dart Cherokee Basin Op. Co., LLC v. Owens*, 135 S. Ct. 547, 561-62 (2014) (Scalia, J., dissenting) (same); *see also* Adam Liptak, *Supreme Court Justices Admit Inconsistency, and Embrace It*, The New York Times at A18 (Dec. 23, 2014).

These Justices' pragmatic recognition—at times in constitutional cases, no less—of the propriety of change is instructive in the present case. As illustrated previously, *see ante* Parts I.C, I.D, II & III, lower courts, criminal defendants, and prosecutors are in precisely the sort of "unacceptable . . . 4–to–1–to–4" situation post-*Freeman* that Justice Scalia voted to avoid in *Gant*. 556 U.S. at 354. In this same spirit, this Court has an opportunity to provide much-needed guidance regarding the availability of resentencing in the Rule 11(c)(1)(C) context.

B. The proper rule is for all Rule 11(c)(1)(C) defendants to be resentenced when a guidelines range implicated by their plea is amended retroactively

Rather than attempt to clarify a rule that leaves lower courts puzzling through documents in search of a meaning that may not be clearly articulated, the Court should adopt a *per se* rule that all defendants sentenced pursuant to Rule 11(c)(1)(C) plea agreements may be resentenced under 18 U.S.C. § 3582(c)(2) when the Sentencing Guidelines applicable to their underlying crime are modified retroactively. Such a rule would reflect the realities of the criminal justice system and plea bargaining. The Sentencing Guidelines are always implicated in a plea bargain. Rule 11(c)(1)(C) agreements are no exception.

The Court should not condition resentencing eligibility on the happenstance of largely boilerplate plea agreements. Nor should it attempt to derive meaning where none may exist. If the United States Sentencing Commission believes a Sentencing Guideline must be amended and makes the additional determination that the amendment should be retroactive, defendants should receive the benefit of that amendment. In this way, the resources that are presently invested litigating a cold plea record to determine whether a sentence reduction is available can be better spent on the work of assigning a new sentence that reflects the objectives under the retroactively-reduced Sentencing Guideline.

C. Congress or the United States Sentencing Commission can always revise this rule if desired

Finally, there is a low risk of undesirable consequences from adopting a rule that all Rule 11(c)(1)(C) defendants are eligible for a sentence reduction when the guidelines implicated by their plea are amended retroactively. There are at least three reasons why a rule in favor of retroactivity would cause no lasting harm.

First, Congress always retains the power to modify § 3582(c)(2) if it believes that an "express statement" rule is required. *See, e.g.*, *Swift & Co. v. Wickham*, 382 U.S. 111, 133-34 (1965) (Douglas, J., dissenting) ("An error in interpreting a federal statute may be easily remedied. If this Court has failed to perceive the intention of Congress, or has interpreted a statute in such a matter as to thwart the legislative purpose, Congress may change it."); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 260 n.* (1970) (Black, J., dissenting) (same).

Second, the Sentencing Commission can refuse retroactive resentencing in its discretion for any amendment to the Sentencing Guidelines. *See* U.S. Sent. Comm'n, Rules of Prac. & Proc. Rule 4.1A,. Thus, retroactive resentencing can occur—regardless of this Court's decisions—only when the Sentencing Commission believes it warranted.

Finally, even in a situation where the Sentencing Commission believes retroactive application of an amendment is warranted, it could adopt a specific guidance for Rule 11(c)(1)(C) pleas if it believed there was some reason they should be treated differently. A

court would have to consider such guidance under the federal resentencing statute, which states that a district court must consider whether "a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Any of these alternative methods likely would produce practical direction tailored to the particular facts of a retroactivity decision, rather than forcing courts to attribute meaning to the random happenstance of a likely boilerplate plea agreement.

CONCLUSION

The judgment of the court of appeals should be reversed.

JANUARY 29, 2018

Respectfully submitted,

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