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Modifying the Restrictions on Sentence Modification: *United States v. Cobb*

I. INTRODUCTION

As of January 29, 2011, approximately 191,000 inmates were serving sentences in federal prisons across the United States;¹ of these sentences that were handed down in 2008, nearly ninety-six percent were the result of a plea agreement.² In the federal criminal system, the Sentencing Commission attempts to ensure that defendants receive similar sentences for similar crimes by establishing sentencing guidelines—a range in which defendants should be sentenced for a particular crime.³ In part because judges are required to consider the guidelines when issuing a sentence,⁴ the guidelines play a key role in plea negotiations, serving as a basis upon which prosecutors and defendants try to determine the best “deal.”⁵ The Sentencing Commission reviews and adjusts the guidelines from time to time based on a variety of factors.⁶ While in most cases a court cannot modify a sentence once it is imposed, 18 U.S.C. § 3582(c)(2) offers an exception when the defendant’s sentence was based on a guideline that was subsequently reduced.⁷ In theory, this prevents a defendant who was sentenced before a guideline

1. *Quick Facts*, FEDERAL BUREAU OF PRISONS (Jan. 29, 2011), <http://www.bop.gov/news/quick.jsp>.

2. *2008 Annual Report Sourcebook of Federal Sentencing Statistics*, Fig. C, UNITED STATES SENTENCING COMMISSION, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2008/FigC.pdf.

3. *An Overview of the United States Sentencing Commission*, UNITED STATES SENTENCING COMMISSION, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited Feb. 24, 2011).

4. See U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (2009); 18 U.S.C. § 3553(b)(1) (2006). Under *United States v. Booker*, 543 U.S. 220 (2005), a sentencing court is not “required” to always follow the guidelines. However, it may be an abuse of discretion for a court to sentence outside the guidelines.

5. See, e.g., *United States v. Bundy*, 613 F. Supp. 2d 35 (D.D.C. 2009), *appeal dismissed, vacated in part*, 2010 WL 3516574 (D.C. Cir. Sept. 03, 2010); *United States v. Carrasquillo*, 2009 U.S. Dist. LEXIS 65671 (N.D. Ill. July 23, 2009); *United States v. Franklin*, 600 F.3d 893 (7th Cir. 2010) (“[T]here is no doubt that the parties considered the guidelines range during their negotiations . . .”).

6. See 28 U.S.C. § 994(n)–(p), (r)–(s) (2006).

7. 18 U.S.C. § 3582(c)(2) (2006).

reduction from receiving a longer sentence than a defendant convicted of the same crime but sentenced after the reduction.

For several years this exception had its own very large exception because circuit courts held that when a defendant entered into a Rule 11 plea agreement, his sentence was based solely on the agreement—even if the defendant, prosecutor, and court consulted the guidelines—thus making him ineligible for a sentence modification under 18 U.S.C. § 3582(c)(2).⁸ In *United States v. Cobb*,⁹ the Tenth Circuit joined what may be a new trend in interpreting 18 U.S.C. § 3582 by holding that a sentence pursuant to a plea agreement may be based on the sentencing guidelines as well as the Rule 11 agreement, thus making these defendants eligible for sentence modifications. This Note argues that the Tenth Circuit was correct in applying a broader interpretation of § 3582. Part II outlines the facts and procedural history of *Cobb*. Part III then discusses the legal background and basis for other circuits' narrow interpretation of the "based on" language of § 3582. Part IV describes the Tenth Circuit's holding in *Cobb*. Finally, Part V discusses how the Tenth Circuit's interpretation is well within the statutory language and more in line with the purpose behind the sentencing guidelines.

II. FACTS AND PROCEDURAL HISTORY

Cobb was charged with four crack cocaine-related offenses in March 1999; he entered into a Rule 11(e)(1)(C)¹⁰ agreement, and ultimately pled guilty to possession of 1000.5 grams of cocaine with intent to distribute.¹¹ The plea agreement stated that the sentence would be determined by applying the sentencing guidelines, noted that the guideline range was 168 to 210 months, and stipulated to a sentence of 168 months, "the bottom of the applicable guideline range."¹² At the sentencing hearing, the judge took note of the guideline range and, finding no reason to depart from it, imposed

8. *See, e.g.*, *United States v. Sanchez*, 562 F.3d 275, 280 (3d Cir. 2009); *United States v. Peveler*, 359 F.3d 369, 372–73, 379 (6th Cir. 2003); *United States v. Trujequé*, 100 F.3d 869, 870 (10th Cir. 1996).

9. 584 F.3d 979 (10th Cir. 2009), *vacated and reinstated*, 603 F.3d 1201 (10th Cir. 2010).

10. Now Rule 11(c)(1)(C).

11. *Cobb*, 584 F.3d at 981.

12. *Id.*

the 168-month sentence, explaining that the “sentence [was] within the guideline range.”¹³

In December 2007, the Sentencing Commission unanimously reduced the sentencing guideline range base offense by two levels for crack cocaine-related offenses and made the reduction retroactive, effective March 2008.¹⁴ Under the revised crack cocaine guidelines, the sentencing range for Cobb’s offense dropped from 168 months to 135.¹⁵ When the revisions became retroactive, Cobb moved for a new sentence pursuant to 18 U.S.C. § 3582(c)(2),¹⁶ which allows a court to consider modifying a sentence when the original sentence is “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.”¹⁷ Cobb argued that his sentence should be reduced to the bottom of the new range because the sentence in his plea agreement was so tied to the guideline range that his sentence was necessarily “based on” the guidelines.¹⁸ The government argued that the sentence was based on the parties’ Rule 11 agreement, not the sentencing guidelines, but at the § 3582 hearing the prosecutor acknowledged that had the guidelines been different at the time of sentencing, the plea agreement would also have been different.¹⁹ The district court determined that the sentence “rest[ed] squarely on the parties’ agreement,” and “as a matter of fact and law” the sentence could not also be based on the guidelines.²⁰ Because the court found that the sentence was based on Rule 11 and not the guideline range, it concluded that § 3582 did not grant it authority to reduce the sentence and thus dismissed Cobb’s modification motion for lack of jurisdiction.²¹

13. *Id.* at 982.

14. *See* UNITED STATES SENTENCING GUIDELINE MANUAL, Supplement to app. C, Amendment 706 (Nov. 1, 2007) (regarding 2-level reduction); UNITED STATES SENTENCING GUIDELINE MANUAL, Supplement to app. c, Amendment 713 (Nov. 1, 2009) (regarding retroactivity).

15. *Cobb*, 584 F.3d at 982.

16. *Id.*

17. 18 U.S.C. § 3582(c)(2) (2006).

18. *Cobb*, 584 F.3d at 982.

19. *Id.*

20. Appellee’s Answer Brief at 14, *United States v. Cobb*, 584 F.3d 979 (10th Cir. 2009) (No. 08-1213) (quoting Record on Appeal vol. V at 28).

21. *Cobb*, 584 F.3d at 981.

III. LEGAL BACKGROUND

With few exceptions, a court cannot modify a sentence once it is imposed.²² One exception is 18 U.S.C. § 3582(c)(2), which allows the court to reduce the sentence “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,” provided that the reduction is consistent with the commission’s policies.²³ Though seemingly straightforward, the interpretation of § 3582’s “based on” language is anything but settled for sentences involving a plea agreement. The circuits that have addressed the issue take opposing views, often with a vigorous dissent promoting the majority position in another circuit, thus making it clear that the question could have easily gone the other way.²⁴

A. Majority View—Narrow Construction of “Based On”

The majority of circuits hold that a Rule 11 agreement precludes application of § 3582(c)(2) by either applying a narrow interpretation of § 3582’s “based on” language, or borrowing common law contract principles and applying them to plea agreements.²⁵ The Sixth Circuit in *United States v. Peveler* determined that even if the plea agreement did no more than specify an offense level, thus leaving the sentence to be determined from the guidelines, because the case involved a plea agreement, the sentence was based exclusively on the agreement and could not be based on a guideline range for purposes of § 3582.²⁶ Thus, defendants who plea-bargain do not fall under the § 3582(c)(2) exception, and the

22. 18 U.S.C. § 3582(c).

23. *Id.* § 3582(c)(2).

24. *See, e.g., Cobb*, 584 F.3d 979; *United States v. Sanchez*, 562 F.3d 275, 280 (3d Cir. 2009); *United States v. Dews*, 551 F.3d 204, 212 (4th Cir. 2008).

25. The Third, Sixth, Eighth, and Ninth Circuits take this position. *See Sanchez*, 562 F.3d 275; *United States v. Scurlark*, 560 F.3d 839 (8th Cir. 2009); *United States v. Bride*, 581 F.3d 888 (9th Cir. 2009); *United States v. Peveler*, 359 F.3d 369, 372–73, 379 (6th Cir. 2003).

26. 359 F.3d at 372–73, 379; *see also United States v. Cieslowski*, 410 F.3d 353, 364 (7th Cir. 2005) (holding that a sentence imposed under Rule 11(c)(1)(C) arises directly from the agreement itself, not from the guidelines).

court has no authority to modify their sentences when the guidelines change.²⁷

In addition to holding that a plea agreement precludes application of § 3582, majorities in the Third and Eighth Circuits, and a dissenting judge in the Fourth Circuit, also emphasize the contractual nature of plea agreements.²⁸ In the Third Circuit, the majority in *United States v. Sanchez*²⁹ noted that even without the dispute over what it means for a sentence to be “based on” the guidelines, a plea agreement is a contract which binds all parties: the defendant, government, and the court.³⁰ In agreeing to a sentence, the defendant gets what she bargained for, and a court does not have the power to revise a contract if all parties do not agree to the change.³¹ Just as a consumer cannot renegotiate an automobile purchase when the price goes down a few years later, a defendant cannot modify his sentence when the sentencing guidelines change.³²

The Second Circuit appears to adopt this majority view. Recent decisions involved distinguishable fact scenarios—defendants were sentenced outside the applicable range,³³ according to a statutory minimum,³⁴ or under a set of guidelines that had not been reduced.³⁵ However, in an unpublished opinion, the court gave a nod of approval to the line of cases that holds that the existence of a plea agreement precludes application of § 3582 in all circumstances.³⁶

27. *Peveler*, 359 F.3d at 379.

28. See *Sanchez*, 562 F.3d at 280; *Scurlark*, 560 F.3d at 842; *Dews*, 551 F.3d at 212 (Agee, J., dissenting); *id.* at 283 (Rendell, J., concurring).

29. *Sanchez*, 562 F.3d at 280 (“[A] sentence prescribed in a binding plea agreement is not ‘based on’ a subsequently lowered sentencing range.”).

30. *Id.* at 282.

31. *Id.*

32. *Id.* at 282 n.7.

33. *United States v. Main*, 579 F.3d 200, 202–03 (2d Cir. 2009).

34. *United States v. Torres*, 2010 U.S. App. LEXIS 18306 (2d Cir. Aug. 31, 2010).

35. *United States v. Castillo*, 378 F. App’x 80 (2d Cir. 2010).

36. *United States v. Kornegay*, 358 F. App’x 236, 238 (2d Cir. 2009). *Kornegay*’s explicit approval of the strict view may be a response to *United States v. Fruster*, 669 F. Supp. 2d 341, 342 (W.D.N.Y. 2009), where a district court granted a sentence reduction, holding that a plea agreement does not automatically preclude modification under § 3582(c)(2).

B. Minority View: United States v. Dews

In contrast, the majority in *United States v. Dews*³⁷ and the dissenting judge in *Sanchez* argued that in cases where the guidelines played a central role in determining the agreed sentence, “it strains credulity to imagine that the plea agreement was *not* based on the Guidelines.”³⁸ In *Dews*, the court held that nothing in Rule 11 precludes a court from modifying a sentence under § 3582, nor does § 3582 require that the sentencing range be the sole basis for the sentence.³⁹ In certain circumstances, “a sentence may be *both* a guidelines-based sentence . . . and a sentence stipulated to by the parties in a plea agreement.”⁴⁰ The dissent in *Sanchez* agreed, noting that a defendant who agrees to a plea agreement does not automatically waive his right to seek resentencing, and courts should not reduce incentives to enter plea agreements by making those defendants ineligible for a sentence modification in the event the guidelines change.⁴¹

C. Undecided Circuits—Possible Trend Towards the Minority View

Until this year, the Seventh Circuit seemed to follow the majority view,⁴² but that appears to be changing. In *United States v. Franklin*,⁴³ the court held that the defendant’s sentence could not be reduced under § 3582 because there was no indication that the parties intended to tie the stipulated sentence to the sentencing guidelines.⁴⁴ However, had the agreement made some reference to the guidelines, the court concluded that it might have had authority to review the defendant’s sentence for a possible reduction under § 3582.⁴⁵

37. 551 F.3d 204, 209 (4th Cir. 2008) (vacated as moot). The panel decision was vacated when the court agreed to hear the case en banc. While their decision was pending, Dews completed his unmodified sentence and was released.

38. *United States v. Sanchez*, 562 F.3d 275, 284 (3d Cir. 2009) (Roth, J., dissenting).

39. *Dews*, 551 F.3d at 209, 212.

40. *Id.* at 209.

41. *Sanchez*, 562 F.3d at 283.

42. *See United States v. Cieslowski*, 410 F.3d 353, 364 (7th Cir. 2005) (holding that “[a] sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the [g]uidelines”).

43. 600 F.3d 893 (7th Cir. 2010).

44. *Id.* at 896.

45. *Id.* at 896–97.

The Fifth Circuit currently appears to agree with the majority; however, there is room in its case law to go either way. In *United States v. Garcia*, the court applied a hybrid approach, concluding that a defendant who was sentenced on the high end of the original guidelines was eligible for a reduction, but the sentence could not be reduced below the plea agreement's 240-month minimum.⁴⁶ Although the Fifth Circuit seemed to grant district courts jurisdiction to consider a reduction under § 3582, it also adopted the contract approach, stating that because plea agreements are binding on all parties, a court cannot modify a sentence beyond what is allowed in the Rule 11 agreement.⁴⁷

D. Tenth Circuit Precedent: United States v. Trujeque

Until *Cobb*, *United States v. Trujeque*⁴⁸ was the leading Tenth Circuit opinion addressing sentence modifications in plea agreement situations and was relied on by other circuits as establishing that a plea agreement precludes the application of § 3582.⁴⁹

Trujeque was indicted on various charges relating to possession and distribution of Lysergic Acid Diethylamide ("LSD"); he pled guilty and agreed to a sentence of eighty-four months.⁵⁰ Trujeque later moved for a reduced sentence based on the then-recently revised LSD sentencing guidelines, but the court determined that because Trujeque was sentenced pursuant to the stipulated agreement, his sentence was not based on a sentencing range that was subsequently lowered.⁵¹ The stipulated sentence was outside the calculated range, but the court stated that this fact was immaterial to its analysis.⁵²

46. 606 F.3d 209, 215 (5th Cir. 2010).

47. *Id.*

48. 100 F.3d 869 (10th Cir. 1996).

49. *See, e.g.*, *United States v. Fields*, 339 F. App'x 872 (10th Cir. 2009); *United States v. Sanchez*, 562 F.3d 275 (3d Cir. 2009); *United States v. Schurlark*, 560 F.3d 839 (8th Cir. 2009); *United States v. Peveler*, 359 F.3d 369 (6th Cir. 2003).

50. *Trujeque*, 100 F.3d at 870.

51. *Id.* at 870–71.

52. *Id.* at 871 n.3.

IV. *UNITED STATES V. COBB*

In *United States v. Cobb*,⁵³ the Tenth Circuit broke from the majority view, going against the common interpretation of *Trujeque*, and concluding that a Rule 11 plea agreement does not preclude application of 18 U.S.C. § 3582(c)(2). Because parties often look to the sentencing guidelines in determining a stipulated sentence, it is “unrealistic” to claim that such sentences are not based on a guideline range.⁵⁴

A. *Cobb’s Plea Agreement*

The multiple references to the sentencing guidelines in the negotiation process, final agreement, and at sentencing were important factors in the court’s conclusion. During sentencing, the trial judge told Cobb that the guidelines helped define his sentence, and he saw no reason to depart from the guidelines. He also said that the guidelines set out by the parties were correct, and the stipulated sentence was the bottom of the guideline range.⁵⁵ In addition, during the § 3582 hearing, the prosecutor acknowledged that “if the [g]uidelines had been a different number . . . probably the [p]lea [a]greement would have been a different number.”⁵⁶ To the Tenth Circuit, these facts indicated that Cobb’s sentence “was tied to the guidelines at every step.”⁵⁷

B. *Distinguishing Trujeque*

Although many courts, and the dissent in *Cobb*, cite *Trujeque* as precedent for not allowing a court to consider a reduction when the party enters into a plea agreement, its factual differences made it easy for the majority to dismiss its precedential value. The guideline range in *Trujeque* was 121 to 151 months, but the plea agreement called

53. *United States v. Cobb*, 584 F.3d 979 (10th Cir. 2009), *reh’g en banc granted*, 595 F.3d 1202 (10th Cir. 2010), *original opinion reinstated*, 603 F.3d 1201 (10th Cir. 2010). After the decision was filed, the Tenth Circuit granted the United States’ petition for rehearing en banc and vacated the initial decision. Following briefing and rehearing, the original opinion was reinstated.

54. *Cobb*, 584 F.3d at 985.

55. *Id.* at 981, 984.

56. *Id.* at 982 (citing the record) (internal quotation marks omitted).

57. *Id.* at 983.

for eighty-four months, well outside the guideline range, making it clear that his sentence was not based on the guidelines.⁵⁸

The majority argued that Cobb's situation was more similar to the defendant in *Dems*, where the sentencing court accepted the plea agreements only after confirming that the stipulated sentences fell within the guidelines.⁵⁹ The Tenth Circuit agreed with the Fourth Circuit's holding that "nothing in the language of § 3582(c)(2) or in the language of Rule 11 precludes a defendant who pleads guilty under Rule 11 . . . from later benefitting from a favorable retroactive guideline amendment."⁶⁰ A sentence may be based on both the guidelines and a Rule 11 plea agreement when the stipulated sentence falls within the guideline range.⁶¹

The Tenth Circuit also rejected other circuits' practice of treating plea agreements as contracts that cannot be changed without agreement by both parties. "We are construing a statute, not common law. Importing contract ideas into our assessment of § 3582 . . . misdirect[s] our focus . . ."⁶² The court found no indication that Congress intended to limit eligibility for a sentence reduction to only non-negotiated sentences; the language of the statute "generally allows for reductions of sentences which are based in any way on a qualifying range."⁶³

C. Policy Considerations

Though not a large portion of the opinion, the court cited the policy reasons behind sentencing guidelines to further reinforce its decision. One of Congress's goals in creating the sentencing commission was to reduce unwarranted disparity in sentencing.⁶⁴ Because plea agreements comprise over ninety percent of all sentences, barring these defendants from receiving a modification under § 3582 undermines this goal.⁶⁵ The narrow interpretation also ignores the significant role the guidelines play in helping parties

58. *Id.* (citing *United States v. Trujeque*, 100 F.3d 869, 870 (10th Cir. 1996)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 984–85.

63. *Id.* at 985.

64. *Id.* (citing 28 U.S.C. § 991(b)(1)(B) (2006)).

65. *Id.*

negotiate an appropriate sentence.⁶⁶ For the Tenth Circuit, “[i]t is simply unrealistic to think that the applicable guideline range is not a major factor (if not *the* major factor) in reaching a stipulated sentence.”⁶⁷

D. Dissent

Judge Hartz’s dissent followed the more common interpretation of § 3582—that a sentence imposed pursuant to a Rule 11 agreement is based on the agreement, not the guidelines, and is thus ineligible for modification under § 3582, even if the parties considered the guidelines when forming their agreement.⁶⁸ Judge Hartz quoted the agreement language, “[t]he parties agree that this plea agreement is entered into pursuant to the provisions of Rule 11(e)(1)(C),” as proof that the sentence was based on Rule 11 and not the guidelines.⁶⁹ He acknowledged that the parties and sentencing judge looked at the guidelines, but emphasized that it was just one of several factors that were considered.⁷⁰

The dissent argued that the majority interpreted § 3582(c)(2)’s language so broadly, allowing any guidelines-based sentence to satisfy the restriction, that virtually every sentence is eligible for modification.⁷¹ Under the majority’s reading, a plea agreement could be modified if any “one of the essential parties—the prosecutor, the defendant, or the district court—considered the guidelines in deciding whether the stipulated sentence was a good idea.”⁷² Because parties always look at the guidelines, Judge Hartz feared that the majority had opened the door for almost every sentence to be modified.⁷³

Judge Hartz argued that a sentence should be eligible for modification “based on a sentencing range” only if the guideline range was miscalculated.⁷⁴ Because Cobb could not have appealed his sentence on the ground that the range was miscalculated, his

66. *Id.*

67. *Id.*

68. *Id.* at 985 (Hartz, J., dissenting).

69. *Id.* at 986.

70. *Id.* at 987.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

sentence was not “based on a guidelines sentencing range and cannot be modified under § 3582(c)(2).”⁷⁵

The dissent also pointed out that while the facts of *Trujeque* were different, the difference was immaterial because that case did not rely on the fact that the sentence was outside the guidelines range.⁷⁶ Furthermore, the majority erred by relying on *Dews* because that opinion was vacated when the court agreed to hear the case en banc.⁷⁷

V. ANALYSIS

The Tenth Circuit’s interpretation of § 3582(c)(2) is well within the statutory language. *Cobb* does not automatically reduce every stipulated sentence. Rather, as stated by the statute, it merely grants the district court discretion to review the sentence and decide “if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”⁷⁸ While this will require courts to look at the actual merits of motions for sentence reduction rather than simply dismissing them for lack of jurisdiction, this interpretation is more consistent with the intent of the statute and the policies behind the sentencing guidelines.

A. Cobb’s Interpretation of § 3582(c)(2) Is Well Within the Statutory Language

In granting courts authority to reduce certain sentences, § 3582(c)(2) makes no distinction between sentences imposed following a trial and those imposed following a plea deal.⁷⁹ All that is required is that the sentence be “based on” a guideline range that is subsequently lowered. During plea negotiations, parties almost always look to the guidelines in order to determine whether the suggested agreement is fair.⁸⁰ And even after the prosecutor and

75. *Id.* at 988.

76. *Id.*

77. *Id.* *Dews* was vacated for a rehearing en banc, but the case was dismissed without an opinion because *Dews* completed his sentence before the case was reheard.

78. 18 U.S.C. § 3582(c)(2) (2006).

79. *Id.*

80. *See, e.g.*, *United States v. Franklin*, 600 F.3d 893, 896 (7th Cir. 2010) (“[T]here is no doubt that the parties considered the guidelines range during their negotiations.”); *United States v. Bundy*, 613 F. Supp. 2d 35 (D.D.C. 2009); *United States v. Carrasquillo*, 2009 U.S. Dist. LEXIS 65671 (N.D. Ill. July 23, 2009); *United States v. Oliver*, 589 F. Supp. 2d 39, 40

defendant have formed an agreement, the district court is required to look at the guidelines when imposing the sentence.⁸¹ Considering that courts readily acknowledge that prosecutors and defense attorneys depend heavily on the guidelines in determining plea deals, the Tenth Circuit is correct in calling it “unrealistic” to think that the resulting sentences are not based on the guidelines. This is especially true in Cobb’s case, where the plea agreement indicated several times that it was based on the applicable guidelines.⁸² In addition, because the statute is unclear as to whether it can be applied in plea agreements, the rule of lenity should apply to interpret the statute in favor of the accused.⁸³

The majority was also correct in refusing to apply contract principles when interpreting criminal statutes. Characterizing plea agreements as simple contracts that are final and binding on both parties⁸⁴ overlooks the fact that modern criminal law is based on statute, not common law, and there is no authority for importing common law into criminal statutes.⁸⁵ A guilty plea “involves the waiver of at least three constitutional rights by a defendant . . . therefore, the analogy of a plea agreement to a traditional contract is not complete or precise, and the application of ordinary contract law principles to a plea agreement is not always appropriate.”⁸⁶ Even if a plea agreement is binding, common law principles borrowed from contract law are superseded by § 3582’s express provision allowing for a sentence’s revision when it is based on the sentencing guidelines. Finally, comparing plea deals to commercial contracts seems inappropriate, as criminal law and sentencing deal with a

(D.D.C. 2008) (“Certainly, the sentencing guidelines may have some bearing on what sentence a defendant decides to plead to because they help inform the defendant of what sentence he could be facing in the event that he decides to go to trial.”).

81. See U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (2009).

82. *Cobb*, 584 F.3d at 981, 982 (majority opinion).

83. Few courts have examined the application of the rule of lenity in sentencing statutes, but some courts indicate that it may apply. See, e.g., *United States v. Jeter*, 329 F.3d 1229, 1230 (11th Cir. 2003) (per curiam).

84. See *United States v. Sanchez*, 562 F.3d 275 (3d Cir. 2009); *United States v. Scurllark*, 560 F.3d 839 (8th Cir. 2009); *United States v. Dews*, 551 F.3d 204, 214 (4th Cir. 2008) (Agee, J., dissenting).

85. *Cobb*, 584 F.3d at 981, 984. But see *United States v. Peveler*, 359 F.3d 369, 375 (6th Cir. 2004).

86. *Peveler*, 359 F.3d at 375 (quoting *United States v. Olesen*, 920 F.2d 538, 541 (8th Cir. 1990)).

defendant's life and liberty—issues much more significant than the price of a commodity.

B. The Tenth Circuit Is Not Bound by Neighboring Circuits

While the majority of circuits take a stricter interpretation of what it means for a sentence to be “based on” the sentencing guidelines, nothing prevents the Tenth Circuit from adjusting its prior interpretation of § 3582. In addition, the recent crack cocaine amendments appear to have prompted other circuits to reconsider their prior interpretations and move in the direction of *Cobb*.

The dissent makes a strong argument in noting that because *Trujeque* did not look to whether the sentence was within the guideline range, the factual distinction alone is not firm enough ground for adopting a completely different interpretation.⁸⁷ However, there are circumstances where a court should re-examine past reasoning to prevent perpetuating an incorrect decision, particularly when a different interpretation does no violence to the statutory language.

Although the dissent was correct that *Dems* was vacated as moot, the majority did not wholly rely on *Dems* in determining that a sentence could be based on more than one factor. Rather, it did what courts often do when facing a legal question—it looked at various arguments and adopted those it found most persuasive.

C. Sentence Reduction Is Not Automatic

The majority's interpretation of § 3582(c)(2) will not allow nearly every sentence to be modified because the statute places additional limits on whether a sentence can be reduced. In addition, many sentences are based on additional factors or guidelines other than those that were reduced.

The statute makes it clear that a revision in the guidelines does not make a sentence reduction automatic; rather, the court must consider “the factors set forth in section 3553(a) to the extent that they are applicable” and grant a reduction “if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”⁸⁸ These factors include the nature and circumstances

87. *United States v. Trujeque*, 100 F.3d 869, 871 n.3 (10th Cir. 1996).

88. 18 U.S.C. § 3582(c)(2) (2006).

of the offense, the history of the defendant, and the need to show the public the seriousness of the offense.⁸⁹ *Cobb* does not remove these statutory limits; it simply grants the district court the authority to review a plea agreement where the sentence was based on a reduced guideline and decide whether the sentencing factors warrant a reduced sentence.

Another limit to *Cobb*'s effect on sentence reduction is that, in many cases, a defendant is sentenced based on a mandatory minimum or career offender calculation, rather than the particular set of guidelines that were subsequently reduced.⁹⁰ In these cases, a defendant cannot be considered for a modified sentence.

D. Purpose and Policy

Finally, the Tenth Circuit's interpretation of § 3582 is correct in light of the purpose and policy behind the sentencing guidelines. The Sentencing Commission was created in part to "provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct."⁹¹ This purpose is defeated when a defendant who is sentenced within the guidelines after going to trial is eligible to receive a reduced sentence, while a defendant who is charged with a similar crime and sentenced within the guidelines after negotiating a plea deal is ineligible. The public interest in promoting plea bargains (in part because they save the time and expense of preparing for and conducting a full trial) is undermined when defendants who plea receive the additional punishment of being ineligible for a sentence reduction for no reason other than they saved public resources by not going to trial.⁹²

89. 18 U.S.C. § 3553(a)(1)–(2) (2006).

90. *See, e.g.*, *United States v. Tupuola*, 587 F.3d 1025, 1027 (9th Cir. 2009) (holding that a defendant was ineligible for a sentence reduction because his sentence was based on career offender rather than crack cocaine guidelines).

91. 28 U.S.C. § 991(b)(1)(B) (2006) (emphasis added).

92. *United States v. Cobb*, 584 F.3d 979, 985 (10th Cir. 2009); *United States v. Sanchez*, 562 F.3d 275, 283 (3d Cir. 2009) (Roth, J., dissenting).

VI. CONCLUSION

The Tenth Circuit was correct in holding that a sentence based on sentencing guidelines should receive the same treatment under § 3582, regardless of whether sentencing occurred after a trial or as the result of a plea agreement. Nothing in § 3582 states that plea agreements based on sentencing guidelines cannot be considered for a subsequent modification, or that the sentencing range must be the sole basis of a sentence in order for the statute to apply. The Tenth Circuit's decision in *Cobb* does not mean that defendants' sentences will be automatically modified every time the guidelines are reduced; rather, it allows the district courts to consider sentencing factors and policies to determine if a reduction is appropriate. While it will require courts to look at the merits of a case rather than simply dismissing it out of hand, a more careful review is required in order to fulfill the purposes of the sentencing guidelines.

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