

# **Between a Rock and a Hard Place: Ensuring that Defendants Incorrectly Sentenced Between the Fair Sentencing Act of 2010 and *United States v. Dorsey* Achieve Re-Sentencing**

CARLY HUDSON\*

*The Fair Sentencing Act of 2010 (FSA) significantly reduced the disparity between crack and powder cocaine sentences in America. After the FSA was enacted, courts disagreed about whether defendants who committed their crimes before the FSA was passed but were sentenced afterwards were eligible for re-sentencing under the FSA. In Dorsey v. United States, the Supreme Court resolved this disagreement by holding that the FSA applies to all defendants sentenced after the FSA's enactment regardless of the date of their offense. This Note focuses on the thousands of defendants who were incorrectly sentenced according to the pre-FSA sentencing laws between the FSA's enactment and Dorsey. Those defendants are being denied the re-sentencing to which they are entitled at every turn. This Note discusses the three most common methods for seeking re-sentencing under the FSA: (1) direct appeal; (2) claims of ineffective assistance of counsel at the defendant's initial sentencing; and (3) motions for re-sentencing due to a retroactive change in the Sentencing Guidelines (§ 3582 motions). The first two methods are consistently foreclosed to defendants seeking re-sentencing under the FSA. The third is the subject of disagreement in the courts. This Note proposes that courts should re-sentence defendants under the FSA through § 3582 motions. Importantly, such a course may be the only way to ensure that these defendants have a viable way to seek the re-sentencing to which they are entitled.*

---

\* Executive Editor, COLUM. J. L. & SOC. PROBS., 2013-2014. J.D. 2014, Columbia Law School. The author would like to thank the staff of the *Columbia Journal of Law and Social Problems*, Taylor Jones, and Patrick Roath, all of whom were indispensable to this project.

## I. INTRODUCTION

From 1986 to 2010, a defendant convicted of possessing 500 grams of powder cocaine triggered the same five-year mandatory minimum sentence as a defendant convicted of possessing only five grams of crack cocaine.<sup>1</sup> This came to be known somewhat notoriously as the “100:1 sentencing disparity.”<sup>2</sup> Because crack convictions were more common in African American communities and cocaine convictions were more common in Caucasian communities, the harsher sentences for crack offenses also had a stark effect along racial lines.<sup>3</sup> Special interest groups, the media, and the general public called upon Congress to remedy this disparity<sup>4</sup> as it became clear the two drugs were equally dangerous and warranted equal sentences.<sup>5</sup> In answer to those concerns, on August 3, 2010, President Obama signed the Fair Sentencing Act of 2010 (FSA) into law.<sup>6</sup> The FSA decreased the disparity between powder and crack cocaine sentences from 100:1 to

---

1. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (repealed 2010).

2. See, e.g., Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity — The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 87–92 (2003).

3. *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 2–3 (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg57626/pdf/CHRG-111shrg57626.pdf> [hereinafter *Subcommittee Hearing*] (statement of Sen. Richard Durbin, Chairman, Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary) (summarizing the disparate impact that the 1986 Act had on African Americans and urging Congress to pass legislation equalizing crack and powder cocaine sentences to remedy that racial disparity. This hearing was a preliminary discussion which eventually became the FSA).

4. See, e.g., Don Dahler, *Racial Overtones in Cocaine Sentencing?*, ABC NEWS (Sept. 22, 2002), <http://abcnews.go.com/Nightline/story?id=128541>; NAACP Calls for Passage of Legislation to End Racial Disparities in Cocaine Sentencing, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (Aug. 30, 2003), <http://www.naacp.org/action-alerts/entry/naacp-calls-for-passage-of-legislation-to-end-racial-disparities-in-cocaine-sentencing>.

5. See D.K. Hatsukami & M.W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 J. AM. MED. ASS'N 1580, 1580 (1996) (concluding that “the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack” and that any variance in addictiveness between crack and powder cocaine arises from the amount used, frequency of use, and method of use, not the form of the drug); see also, U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 54, fig. 17 (2002), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf) (showing that in 2000, 74.5% of overall crack offenses did not involve weapons in any way and only 2.3% of all crack offenses involved the offender actually using a weapon. In the remaining 21.2% of cases the offender had access to or possession of a weapon but did not use it).

6. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

18:1.<sup>7</sup> The public praised the FSA as a much-needed step toward equality in American sentencing.<sup>8</sup>

Special interest groups then began a campaign to apply the FSA retroactively.<sup>9</sup> Courts divided on the issue,<sup>10</sup> and on June 21, 2012, in *Dorsey v. United States*, the Supreme Court decided that the FSA would apply to all offenders sentenced after the FSA was passed, even if they committed their crimes before the FSA was passed.<sup>11</sup> The decision to apply the FSA broadly received widespread support<sup>12</sup> and there has been little, if any, discussion about how to improve it. To be sure, many special interest groups maintain that the crack to powder cocaine sentencing disparity should be eliminated entirely.<sup>13</sup> But as the law is currently written, the general consensus seems to be that it is being applied fairly. The public and the government have moved on to other battles.

In cases like Marcus Lawe's, the public's satisfaction seems appropriate. Marcus Lawe was convicted of possessing with intent to distribute fifty grams or more of crack cocaine<sup>14</sup> on December 14, 2010.<sup>15</sup> At that time, before the Supreme Court decided *Dorsey*, the Fourth Circuit had held that the FSA did not apply to defendants like Lawe with pre-FSA crimes and post-FSA sen-

---

7. *Id.* at § 2(a)(1)–(2); 21 U.S.C. § 841(b)(1)(A)–(C) (2006 ed. and Supp. IV) (amended 2010).

8. See, e.g., Editorial, *The Fair Sentencing Act Corrects a Long-Time Wrong in Cocaine Cases*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html>.

9. See, e.g., *Crack Cocaine Mandatory Minimum Sentences*, FAM. AGAINST MANDATORY MINIMUMS, <http://famm.org/mandatory-sentencing/state-and-federal/us-congress/crack-cocaine-mandatory-minimum-sentences> (last visited Sept. 9, 2014).

10. Compare *United States v. Bullard*, 645 F.3d 237, 239 (4th Cir. 2011) (“We . . . join all of our sister circuits to have addressed the issue in holding that the Savings Statute does indeed preclude retroactive application of the FSA.”), with *United States v. Douglas*, 644 F.3d 39, 42–44 (1st Cir. 2011) (“While Congress meant the new guidelines to control sentencings after November 1, 2010, it cannot have intended that its new mandatory minimums be ignored, for the new mandatory minimums were adopted in the same statute as the directive that new guidelines be adopted.”).

11. *Dorsey v. United States*, 132 S. Ct. 2321, 2323 (2012).

12. See, e.g., *Supreme Court Rules Fairer Sentences Apply to More Drug Cases*, AM. CIV. LIBERTIES UNION (June 21, 2012), <https://www.aclu.org/criminal-law-reform/supreme-court-rules-fairer-sentences-apply-more-drug-cases> (stating that the ACLU regards the Supreme Court's decision in *Dorsey* as “uphold[ing] the [Fair Sentencing] Act's self-proclaimed objective to ‘restore fairness to Federal cocaine sentencing’ and end a legacy of racial discrimination in criminal sentencing”).

13. See, e.g., *Crack Cocaine Mandatory Minimum Sentences*, *supra* note 9.

14. *Lawe v. United States*, 905 F. Supp. 2d 744, 745 (E.D. Va. 2012).

15. *Lawe v. United States*, 843 F. Supp. 2d 636, 637 (E.D. Va. 2012).

tences.<sup>16</sup> Accordingly, the court sentenced Lawe to the ten-year mandatory minimum sentence required by the pre-FSA sentencing laws.<sup>17</sup> After *Dorsey*, Lawe petitioned for re-sentencing under the FSA and the court consented, stating, “Lawe is plainly entitled to relief.”<sup>18</sup> The justice system moved smoothly for Lawe.

Not all defendants are so lucky. Ninety-seven percent of all convictions in federal court are pursuant to a plea agreement,<sup>19</sup> and in two-thirds of those plea agreements the defendant waives his or her right to appeal.<sup>20</sup> The law regarding enforceability of plea agreements is settled and leaves little room for defendants to circumvent such an agreement once finalized.<sup>21</sup> Accordingly, courts enforce plea agreements regardless of a defendant’s eligibility for re-sentencing under the FSA.<sup>22</sup> Direct appeal is not a

---

16. *Id.* at 637.

17. *Id.*

18. *Lawe*, 905 F. Supp. 2d at 746. It is noteworthy that Lawe originally petitioned for re-sentencing due to ineffective assistance of counsel under 28 U.S.C. § 2255. The court stated that it did not “need to address the merits of an ineffective assistance claim, because *Dorsey* provides entitlement to relief. The court construes Lawe’s *pro se* petition liberally . . . and concludes that Lawe stated a request for relief under the terms of the FSA itself, irrespective of his allegations concerning ineffective assistance of counsel. . . .” *Id.* at 746. As will become apparent throughout the course of this Note, the Eastern District of Virginia was remarkably charitable with Lawe.

19. Andrew Dean, *Challenging Appeal Waivers*, 61 BUFF. L. REV. 1191, 1191 (2013) (citing Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. TIMES, July 7, 2012, at A24, available at [http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-review-me.html?\\_r=0](http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-review-me.html?_r=0)). Criminal defendants have a right under the Sixth Amendment to a trial by an impartial jury. U.S. CONST. amend. VI. However, a defendant may choose to enter into a guilty plea, an agreement with the government whereby the parties agree that a certain sentence is appropriate and the defendant waives his right to a trial. *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

20. Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 209 (2005). Defendants have a right to appeal a federal district court’s conviction. *Rodriguez v. United States*, 395 U.S. 327, 330 (1969). However, when a defendant chooses to plead guilty and waive his right to a trial, the plea agreement often includes provisions waiving other rights as well, such as the right to appeal. Waivers of this sort are valid as long as the defendant agreed to them knowingly and voluntarily. *Mezzanatto*, 513 U.S. at 210. This Note further discusses appeal waivers in Part III.A.

21. *United States v. Bailey*, No. 10 Cr. 391(CM), 2013 WL 1828669, at \*3–4 (S.D.N.Y. Apr. 19, 2013) (“There is no doubt that appeal/collateral attack waivers are, as a general rule, enforceable.”). *See also, e.g.*, *United States v. Adigun*, 703 F.3d 1014, 1022 (7th Cir. 2012) (denying re-sentencing under the FSA despite government cooperation with the defendant because “even when the government fails to assert the waiver effect of a defendant’s unconditional plea, the appellate court has an independent obligation to reject the appeal”); *United States v. Hible*, 700 F.3d 958, 962 (7th Cir. 2012) (enforcing a defendant’s appeal waiver because even though the defendant raised his argument in light of the FSA at his sentencing, he eventually agreed to a plea deal according to the pre-FSA Sentencing Guidelines).

22. *See infra* Part III.A of this Note for an analysis of these cases.

viable route to re-sentencing for defendants who waived their right to appeal as part of their plea agreements.

However, there are ways for a defendant to seek re-sentencing despite an appeal waiver. Roughly 28 percent of all appeal waivers preserve the right to raise a claim of ineffective assistance of counsel,<sup>23</sup> and some courts will allow a defendant to raise such a claim even if his or her appeal waiver did not expressly preserve that right.<sup>24</sup> But even defendants who are allowed to move for re-sentencing due to ineffective assistance of counsel are consistently denied re-sentencing under the FSA.<sup>25</sup> FSA-eligible defendants often argue that their counsel was deficient for failing to argue for sentencing under the FSA in anticipation of *Dorsey*. The vast majority of courts deny those claims, reasoning that an attorney's failure "to raise a claim . . . that undeniably would lose under current law but might succeed based on the outcome of a forthcoming Supreme Court decision" does not constitute ineffective assistance of counsel.<sup>26</sup> Ineffective assistance of counsel claims are thus not a viable method of re-sentencing for FSA-eligible defendants.

Fortunately, 18 U.S.C. § 3582(c)(2) presents a third possible avenue for re-sentencing.<sup>27</sup> Section 3582(c)(2) grants courts the power to re-sentence defendants when the United States Sentencing Council promulgates a retroactive amendment to the Sentencing Guidelines.<sup>28</sup> Guidelines Amendment 750, which incorporated the FSA into the Sentencing Guidelines, is just such a retroactive amendment.<sup>29</sup> Unfortunately, the availability of this option to defendants seeking re-sentencing under the FSA is not as straightforward as it may initially appear.<sup>30</sup> Courts currently disagree about whether they may re-sentence FSA-eligible de-

---

23. King & O'Neill, *supra* note 20, at 244.

24. *E.g.*, United States v. Carrion, 107 F. App'x 545, 546 (6th Cir. 2004); United States v. Parra, 112 F. App'x 910, 911 (4th Cir. 2004) (per curiam).

25. See *infra* Part III.B of this Note for an analysis of these cases.

26. Dell v. United States, 710 F.3d 1267, 1282 (11th Cir. 2013). See also, *e.g.*, Tinnin v. United States, No. 1:12-cv-01360-SEB-MJD, 2013 WL 2407566, at \*2 (S.D. Ind. May 30, 2013) (internal quotations omitted) ("Tinnin alleges that his trial counsel was ineffective because he should have preserved an argument that Tinnin, sentenced after the Fair Sentencing Act was passed, should have been subject to the new penalties at the time of sentencing on December 2, 2010. This argument is frivolous. A failure of a lawyer to anticipate shifts in legal doctrine cannot be condemned as objectively deficient.").

27. 18 U.S.C. § 3582(c)(2) (2002).

28. *Id.*

29. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 750, pt. A (2011).

30. See *infra* Parts III.C–IV for a discussion of § 3582(c)(2).

fendants using § 3582(c)(2).<sup>31</sup> The disagreement, discussed at length in Part III.C of this Note, centers on the language of § 3582(c)(2), which allows courts to re-sentence defendants who were initially sentenced “based on” a Sentencing Guideline that was later amended.<sup>32</sup> Some courts interpret that language to mean § 3582(c)(2) applies when the defendant was originally sentenced according to a Guidelines range but not when the defendant was sentenced according to an independent statutory mandatory minimum sentence, like the mandatory minimums created by the 1986 Act or the FSA.<sup>33</sup> Other courts interpret § 3582(c)(2) to allow re-sentencing for defendants sentenced according to statutory mandatory minimums where those mandatory minimums were incorporated into the Sentencing Guidelines, like the FSA and Guidelines Amendment 750.<sup>34</sup> The latter interpretation allows defendants to seek re-sentencing under the FSA, while the former does not.

Thus, two out of the three main methods of re-sentencing are foreclosed to FSA-eligible defendants sentenced between the FSA’s enactment and *Dorsey*. This Note argues for an interpretation of the third method, 18 U.S.C. § 3582(c)(2), that allows courts to re-sentence FSA-eligible defendants.<sup>35</sup> An alternative interpretation, which would preclude re-sentencing through § 3582(c)(2), would leave defendants sentenced between the FSA’s enactment and *Dorsey* without a means to achieve re-sentencing under the FSA.<sup>36</sup> If this alternative interpretation prevails, the FSA will fail to reach the thousands of defendants sentenced in the two years between the FSA’s enactment and *Dorsey*, despite their otherwise eligible crimes and sentencing dates.<sup>37</sup> This Note

---

31. Compare *United States v. Doe*, 731 F.3d 518, 526 (6th Cir. 2013) (re-sentencing defendant under § 3582(c)(2) because “applying the new minimums in Defendant’s [Guidelines range] calculation is the only way to give effect to Congress’ intent to achieve consistency with other Guidelines provisions”), with *United States v. Bell*, 731 F.3d 552, 555 (6th Cir. 2013) (denying re-sentencing because the FSA is a Congressional statute, not an amendment to the Sentencing Guidelines).

32. 18 U.S.C. § 3582(c)(2) (2002).

33. See *infra* notes 135–40 and accompanying text.

34. See *infra* notes 132–34 and accompanying text.

35. See *infra* notes 148–51 and accompanying text for a discussion of the interpretation of 18 U.S.C. § 3582(c)(2) that would allow re-sentencing for FSA-eligible defendants.

36. See *infra* notes 152–57 and accompanying text for a discussion of the interpretation of 18 U.S.C. § 3582(c)(2) that would deny re-sentencing for FSA-eligible defendants.

37. U.S. SENTENCING COMM’N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT, Table 2 (2014) (stating that as of June 2014, 12,951 defendants have sought re-sentencing (through various means) under the FSA and 5,245 of those

examines just how close the judiciary is to closing the last door to re-sentencing for defendants sentenced between the FSA's enactment and *Dorsey* and proposes a way to ensure that door stays open.

This Note discusses the Fair Sentencing Act and its application, or lack thereof, to defendants who were sentenced between the FSA's enactment and the Supreme Court's decision in *Dorsey v. United States*. Part II discusses the history behind the Fair Sentencing Act, the Act itself, and the Supreme Court's interpretation of it in *Dorsey*. Part III of this Note discusses the three most common methods by which a defendant may seek re-sentencing: (1) direct appeals; (2) ineffective assistance of counsel claims; and (3) claims based on an amendment to the Sentencing Guidelines. Part III further explains that direct appeal and ineffective assistance of counsel claims are foreclosed to FSA-eligible defendants, but that the law is unsettled regarding claims based on a Sentencing Guidelines amendment. Part IV proposes a reading of 18 U.S.C. § 3582(c)(2), the statute that allows re-sentencing due to a Sentencing Guidelines amendment, that would preserve § 3582(c) as a viable path to re-sentencing for defendants.<sup>38</sup>

## II. HISTORY OF THE FAIR SENTENCING ACT OF 2010

### A. THE ANTI-DRUG ABUSE ACT OF 1986 AND THE FAIR SENTENCING ACT OF 2010

In 1986, Congress passed the Anti-Drug Abuse Act of 1986 (the "1986 Act"), which created a 100:1 disparity between crack and powder cocaine sentences.<sup>39</sup> Congress overturned the 1986

---

defendants were denied re-sentencing (for various reasons)). The Sentencing Commission has not kept complete records of when each defendant was originally sentenced, with what statute he or she sought re-sentencing, and why it was denied. While the statistics are not perfect, they are enough to illustrate the gravity of the issue.

38. 18 U.S.C. § 3582(c)(2) (2002).

39. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, Title I, §§ 1002(ii)–(iii) (1986) (repealed 2010). The 100:1 sentencing disparity meant that a defendant convicted of possessing *N* grams of crack cocaine would be sentenced to *X* years in prison, while a defendant would need to possess 100*N* grams of powder cocaine to receive the same sentence (*X*). *Id.* at Title I, §§ 1002(2)(ii)–(iii). *See also Subcommittee Hearing, supra* note 3, at 2 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary) ("Under [the 1986 Act] mere possession of 5 grams of crack—the weight of five packets of sweetener—carries the same sentence as

Act when it came to light that crack and powder cocaine were equally dangerous drugs,<sup>40</sup> and that the 1986 Act had a strikingly disparate effect along racial lines.<sup>41</sup> The FSA,<sup>42</sup> which replaced the 1986 Act, decreased the ratio of powder cocaine to crack cocaine necessary to trigger harsh mandatory minimum sentences from 100:1 to 18:1.<sup>43</sup> The FSA also directed the United States Sentencing Commission<sup>44</sup> to amend the federal Sentencing Guidelines to reflect the law applicable to crack cocaine offenders.<sup>45</sup> The Sentencing Commission responded by enacting Guidelines Amendment 750 in 2011.<sup>46</sup>

---

distribution of half a kilogram of powder—or 500 packets of sweetener. That is the difference.”).

40. See 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009), available at <https://beta.congress.gov/crec/2009/10/15/CREC-2009-10-15-pt1-PgS10488.pdf> (statement of Sen. Richard Durbin, Chairman, Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary) (“Crack is not more addictive than powder cocaine, and crack cocaine offenses do not involve significantly more violence than powder cocaine offenses. Those were the two things that led us to this gross disparity in sentencing. . . . We were told [crack cocaine] is different. . . . It is not.”).

41. See *Subcommittee Hearing*, *supra* note 3, at 5 (statement of Lanny Breuer, Assistant Att’y Gen.) (stating that 80% of all defendants convicted of crack offenses in 2006 were African American while 10% were Caucasian). See also Brief for Am. Civ. Liberties Union et. al as Amici Curiae Supporting Petitioners, *Dorsey v. United States*, 132 S. Ct. 2321 (2012) at 15 (noting that in 2010, before the FSA went into effect, Caucasians constituted 7.3% of all crack convictions while African Americans constituted 78.5%); Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing*, U.S. NEWS (Aug. 3, 2010), <http://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing> (“No class of drug is as racially skewed as crack in terms of numbers of offenses. . . . Combined with a 115-month average imprisonment for crack offenses versus an average of 87 months for cocaine offenses, this makes for more African Americans spending more time in the prison system.”).

42. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

43. *Id.* The Fair Sentencing Act raised the amount of crack cocaine required to trigger mandatory minimum sentences while keeping the amount of powder cocaine required to trigger those minimums as it was under the pre-FSA sentencing regime. Under the FSA, a defendant need only possess 18x grams of powder cocaine to receive the same sentence as a defendant in possession of x grams crack cocaine, as opposed to the 100x grams of powder cocaine required under the Anti-Drug Abuse Act of 1986. *Id.*

44. The United States Sentencing Commission is an independent agency within the judicial branch of government. One of its principal purposes is “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.” *Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM’N, [http://www.ussc.gov/About\\_the\\_Commission/index.cfm](http://www.ussc.gov/About_the_Commission/index.cfm) (last visited Feb. 28, 2014). For simplicity, this Note refers to the United States Sentencing Commission as “the Sentencing Commission” from this point forward.

45. § 8(2), 124 Stat. at 2374.

46. U.S. SENTENCING GUIDELINES MANUAL amend. 750. See also *infra* notes 139–42 and accompanying text for an overview of Guidelines Amendment 750.

The FSA was hailed as “a courageous and historic step . . . toward making the criminal justice system more fair.”<sup>47</sup> However, Congress’ failure to address a number of questions compromised the effectiveness of the Act. Specifically, Congress failed to indicate, and courts subsequently disagreed about, whether the FSA should apply to defendants who committed their offenses before the FSA was passed but were sentenced after that date.<sup>48</sup>

Several legislators responded to this uncertainty by stating that the FSA should apply to defendants with pre-Act criminal conduct and post-Act sentences.<sup>49</sup> Two co-sponsors of the FSA, Senator Richard Durbin and Senator Patrick Leahy, wrote to Attorney General Eric Holder explaining that the goal of the FSA was to “restore fairness to federal cocaine sentencing as soon as possible” and urging that “the Fair Sentencing Act’s reduced crack penalties should apply to defendants whose conduct pre-dates enactment of the legislation but who have not yet been sentenced.”<sup>50</sup> The legislators who championed the FSA clearly articulated to the other branches of government that no offender sentenced after the FSA was passed should be denied sentencing under its terms.<sup>51</sup>

On July 15, 2011, Attorney General Holder responded to Congress’ plea by issuing a memorandum to all federal prosecutors stating that the FSA should apply to all defendants sentenced after the FSA was enacted even if they committed their offenses before that date.<sup>52</sup> Attorney General Holder asserted, “Congress intended the Act not only to ‘restore fairness in federal cocaine sentencing policy’ but to do so as expeditiously as possible.”<sup>53</sup>

---

47. Editorial, *supra* note 8.

48. Compare *United States v. Bullard*, 645 F.3d 237, 239 (4th Cir. 2011) (“We . . . join all of our sister circuits to have addressed the issue in holding that the Savings Statute does indeed preclude retroactive application of the FSA.”), with *United States v. Douglas*, 644 F.3d 39, 42–44 (1st Cir. 2011) (“While Congress meant the new guidelines to control sentencings after November 1, 2010, it cannot have intended that its new mandatory minimums be ignored, for the new mandatory minimums were adopted in the same statute as the directive that new guidelines be adopted.”).

49. Letter from Sen. Richard Durbin and Sen. Patrick Leahy to Att’y Gen. Eric Holder (Apr. 29, 2009), available at <http://www.fd.org/docs/crack-cocaine/fair-sentencing-act-ag-holder-letter-111710-1-.pdf> (explaining that the FSA was meant to apply to all defendants sentenced after the FSA was enacted regardless of their offense date).

50. *Id.*

51. *Id.*

52. Memorandum from Att’y Gen. Eric Holder to all Federal Prosecutors (July 15, 2011), available at <http://www.fd.org/docs/crack-cocaine/Holder-FSA-memo-7-15-11.pdf>.

53. *Id.*

However, as executive memoranda are not binding on the courts,<sup>54</sup> some circuits continued to deny petitions for re-sentencing under the FSA even if the offender was sentenced after the Act's effective date.<sup>55</sup>

### B. *DORSEY v. UNITED STATES*

A year later, the Supreme Court addressed the disagreement among the courts in *Dorsey v. United States*.<sup>56</sup> The petitioners in *Dorsey* were Corey Hill and Edward Dorsey, men convicted of selling crack cocaine in 2007 and 2008, respectively.<sup>57</sup> Both committed their offenses before the FSA took effect and both were sentenced after the FSA was enacted.<sup>58</sup> The courts in each case sentenced the defendants to the ten-year mandatory minimum sentence in place at the time of their offenses.<sup>59</sup> Both judges explained in their opinions that they felt bound to apply the mandatory minimums that were in effect at the time of the offenses, even though the Fair Sentencing Act had lowered those mandatory minimums by the time the defendants were sentenced.<sup>60</sup> Subsequently, the Supreme Court granted certiorari in Mr. Hill and Mr. Dorsey's cases to decide whether the Fair Sentencing Act applied to defendants with pre-Act offenses and post-Act sentences.<sup>61</sup>

The text of the FSA does not state explicitly whether it applies to pre-Act offenders with post-Act sentences. The Supreme Court instead based its decision on the legislative intent of the Act.<sup>62</sup> Some lower courts had concluded that because Congress did not explicitly state that the FSA should apply to pre-Act offenders

---

54. *Medellin v. Texas*, 552 US 491, 523–24 (2008) (rejecting an argument that an executive memorandum is binding on the judiciary).

55. *See, e.g.*, *United States v. Gardner*, 837 F. Supp. 2d 346, 350 (S.D.N.Y. 2011) (holding that defendants with pre-Act offenses and post-Act sentences are not eligible for sentencing under the FSA. The court even discussed Attorney General Holder's memorandum stating that the FSA should apply to these defendants but concluded that that memorandum was not binding on the courts and declined to adhere to it).

56. *United States v. Dorsey*, 132 S. Ct. 2321 (2012).

57. *Id.* at 2329. The Supreme Court consolidated Mr. Dorsey's and Mr. Hill's cases and issued a single opinion most commonly referred to under Mr. Dorsey's name.

58. *Id.* at 2329–30.

59. *Id.*

60. *Id.*

61. *Id.* at 2321.

62. *Id.* at 2326 (“The underlying question before us is one of congressional intent as revealed in the Fair Sentencing Act's language, structure, and basic objectives.”).

with post-Act conduct, the 1871 Saving Statute<sup>63</sup> prohibited courts from applying the FSA to any pre-Act offenders.<sup>64</sup> The Supreme Court rejected that rationale, explaining that Congress may express its intentions either explicitly or by “necessary implication.”<sup>65</sup> After considering the language of the FSA,<sup>66</sup> other federal sentencing legislation,<sup>67</sup> and the continued disparate treatment of offenders that would result from sentencing pre-Act offenders according to the pre-Act sentencing regime,<sup>68</sup> the Supreme Court concluded that the FSA applies to all defendants sentenced after the FSA was enacted regardless of the dates of their offenses. Accordingly, the Court vacated the two defendants’ sentences and remanded for re-sentencing in accordance with the FSA.<sup>69</sup>

*Dorsey* resolved the first question that arose about how to apply the FSA. After *Dorsey*, the judiciary had clear instructions to apply the FSA to all offenders who were yet to be sentenced, regardless of their offense dates. But *Dorsey* did not explicitly state whether lower courts could re-sentence offenders who were incorrectly sentenced between the FSA’s enactment and *Dorsey*. Be-

---

63. 1 U.S.C. § 109 (2011) (“The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.”). The Saving Statute states that, unless Congress expressly directs otherwise, courts should sentence defendants according to the statutory scheme in place at the time of their offense. *Id.*

64. *Dorsey*, 132 S. Ct. at 2331.

65. *Id.* at 2331–32 (quoting *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908)).

66. *Id.* at 2332 (noting that the FSA requires the Sentencing Commission to promulgate Sentencing Guidelines that conform with the FSA “as soon as practicable”). The Supreme Court concluded that this provision calls for “application of the new Guidelines amendments to offenders who committed their offense prior to the new amendments’ effective date but were sentenced thereafter.” *Id.*

67. *Id.* at 2331 (asserting that the Sentencing Reform Act, 18 U.S.C. § 3553(a)(4)(A)(ii) (2010), states that courts should apply the Sentencing Guidelines in effect at the time of an offender’s sentencing).

68. *Id.* at 2333 (reasoning that continuing to sentence defendants according to the pre-FSA sentencing regime if they were convicted before the FSA was passed would “create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent”). For example, two otherwise identical offenders who were sentenced on the same date but convicted on different dates, one before the FSA was enacted and one after the FSA was enacted, would receive radically different sentences. *Id.* See also *infra* notes 183-97 and accompanying text for further discussion of the enhanced disparate treatment of defendants that would result if any defendants sentenced after the FSA was enacted were sentenced according to the pre-FSA sentencing regime.

69. *Dorsey*, at 2336.

cause the process of vacating a sentence already in place and re-sentencing a defendant is governed by its own complex statutes and precedents, the lower courts have not interpreted *Dorsey* to straightforwardly allow re-sentencing for defendants who were incorrectly sentenced before *Dorsey*.<sup>70</sup> The following Part of this Note examines the legal landscape that has developed regarding when *Dorsey* applies to defendants seeking re-sentencing under the FSA's terms.

### III. THE PROBLEM: COURTS ARE DENYING RE-SENTENCING TO FSA-ELIGIBLE DEFENDANTS AT (ALMOST) EVERY TURN

Many defendants who received sentences under the pre-FSA sentencing regime between the FSA's enactment and *Dorsey* learned that *Dorsey* entitled them to more lenient sentences and sought re-sentencing.<sup>71</sup> There are three primary ways FSA-eligible defendants seek re-sentencing: (1) direct appeal;<sup>72</sup> (2) ineffective assistance of counsel claims;<sup>73</sup> and (3) claims that the Sentencing Guidelines range under which they were sentenced has been retroactively amended.<sup>74</sup> Defendants seeking re-sentencing under the FSA have encountered barriers to each of these avenues.

Courts have definitively foreclosed defendants from seeking re-sentencing by either direct appeal or ineffective assistance of counsel claims. Parts III.A and III.B discuss those two doctrines, respectively. However, the law is not yet settled regarding § 3582(c)(2). In Part III.C, this Note discusses a currently developing trend regarding whether defendants may seek re-sentencing under the FSA through § 3582(c)(2). If this trend continues to develop in the same manner, this appeal may also be closed to defendants seeking re-sentencing under the FSA.

---

70. See *infra* Part III for an analysis of the three primary avenues for re-sentencing and the doctrines governing how they may be used.

71. See, e.g., *United States v. Doe*, 731 F.3d 518, 522 (6th Cir. 2013); *United States v. Berry*, 701 F.3d 808, 809 (5th Cir. 2012); *United States v. Edmonds*, 700 F.3d 146, 147–48 (4th Cir. 2012); *United States v. Gamble*, 683 F.3d 932, 932 (8th Cir. 2012); *United States v. Liberse*, 688 F.3d 1198, 1200 (11th Cir. 2012); *Lawe v. United States*, 905 F. Supp. 2d 744, 745 (E.D. Va. 2012).

72. See *infra* Part III.A for a discussion of direct appeals.

73. See *infra* Part III.B for a discussion of ineffective assistance of counsel claims.

74. See *infra* Part III.C for a discussion of claims for re-sentencing due to a retroactive change in the Sentencing Guidelines.

### A. PLEA AGREEMENTS THAT INCLUDE A WAIVER OF THE RIGHT TO APPEAL

Criminal defendants have a constitutional right to a trial by an impartial jury.<sup>75</sup> However, a defendant may choose not to exercise that right and to instead enter into a guilty plea.<sup>76</sup> A guilty plea is an agreement with the government whereby the defendant waives his right to a trial, usually in exchange for something like a specific, agreed-upon sentence.<sup>77</sup> The exact terms of the plea agreement vary from case to case. Plea agreements often include provisions waiving other rights in addition to the defendant's right to a jury trial, such as the defendant's right to appeal.<sup>78</sup>

Ninety-seven percent of all convictions in federal court are brought about by plea agreements,<sup>79</sup> and nearly two-thirds of these plea agreements include a waiver of the defendant's right to appeal.<sup>80</sup> A guilty plea is valid, even if it includes a waiver of the defendant's constitutional rights,<sup>81</sup> if it can be established that the defendant agreed to the plea knowingly and voluntarily.<sup>82</sup>

---

75. U.S. CONST. amend. VI.

76. *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

77. *Id.*

78. *Id.*

79. Dean, *supra* note 19, at 1191.

80. King & O'Neill, *supra* note 20, at 209 (drawing data from a 2005 study of 971 randomly selected cases sentenced under the United States Sentencing Guidelines). It is also interesting to note that the frequency of appeal waivers varies across the country. For example, 90% of all plea agreements in the Ninth Circuit include a waiver of the right to appeal. Dean, *supra* note 19, at 1197. By contrast, 9% of all plea agreements involve an appeal waiver in the First Circuit. *Id.* At the district level, the aforementioned 2005 study found that 30% of all plea agreements reviewed in the Southern District of Texas contained appeal waivers. King & O'Neill, *supra* note 20, at 253. In the Western District of Texas, just one district over, the frequency of appeal waivers grew to 93.3%. *Id.*

81. *Mezzanatto*, 513 U.S. at 210 (upholding a defendant's waiver of his right not to have statements made during plea negotiations used to impeach him should plea negotiations fail); *Town of Newton v. Rumery*, 480 U.S. 386, 398 (1987) (upholding a waiver of the defendant's right to sue a township under federal statute).

82. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). A plea is "knowing and voluntary" if the defendant understands a number of things listed in Federal Rule of Criminal Procedure 11. The defendant must understand (A) that the government may use any statements the defendant made in the course of the plea negotiations in a future prosecution for perjury, (B) that the defendant has a right to plead not guilty, (C) that the defendant has a right to a jury trial, (D) that the defendant has a right to the representation of counsel, (E) that the defendant has a right to confront adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to bring witnesses, (F) that the defendant waives these rights if he pleads guilty, (G) the nature of each charge, (I) any mandatory minimum penalty applicable to those charges, (J) any forfeiture incident to

Although the Supreme Court has not confirmed the validity of waivers of the right to appeal specifically, the circuits are in agreement that such waivers are valid.<sup>83</sup>

Many defendants who waived their right to appeal before the Supreme Court's decision in *Dorsey* have since petitioned for resentencing according to the FSA's provisions. Those defendants argue that the court should not enforce their appeal waivers because they could not have known when they entered into their plea agreements that they would later become eligible for sentencing under the FSA.<sup>84</sup> Such arguments have found no sympathy with the courts, which have "consistently rejected arguments that an appeal waiver is invalid because the defendant did not anticipate subsequent legal developments."<sup>85</sup> The message is that

---

those charges, (K) the court's authority to order restitution, (L) the court's obligation to impose a special assessment, (M) the court's obligation to calculate and consider the applicable Sentencing Guidelines range, (N) the terms of all plea agreement provisions, and (O) the ramifications of a guilty plea for non-United States citizens. FED. R. CRIM. P. 11(b)(1)(A)–(O), (b)(2). A court must address the defendant personally before accepting his or her guilty plea to ensure that the defendant understands all of those things. FED. R. CRIM. P. 11(b)(1).

83. See, e.g., *United States v. Copeland*, 707 F.3d 522, 528–30 (4th Cir. 2013), *United States v. Bradley*, 400 F.3d 459, 463–66 (6th Cir. 2005); *United States v. Killgo*, 397 F.3d 628, 629 n.2 (8th Cir. 2005); *United States v. Johnson*, 67 F.3d 200, 202–03 (9th Cir.1995); *United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990).

84. See, e.g., *United States v. Tyus*, 526 Fed. App'x 581, 582 (6th Cir. 2013) (rejecting defendant's argument "that *Dorsey* renders his plea unknowing, because the district court failed to use the FSA's reduced penalties"); *United States v. Harrison*, 699 F.3d 158, 159 (2d Cir. 2012) (quoting *United States v. Riggi*, 649 F.3d 143, 150 n.7 (2d Cir. 2011)) (stating that a "defendant's inability to foresee that subsequently decided cases would create new appeal issues does not provide a basis for failing to enforce an appeal waiver").

85. *Tinnin v. United States*, No. 1:12-CV-01360-SEB-MJD, 2013 WL 2407566, at \*2 (S.D. Ind. May 30, 2013) (internal quotations omitted). See also *United States v. Brickhouse*, 517 Fed. App'x 22, 23 (2d Cir. 2013) ("Even though the Supreme Court has since determined . . . that the Fair Sentencing Act of 2010 may apply retroactively to criminal conduct completed before the Act's effective date, the change in law does not render Brickhouse's appellate waiver unenforceable."); *United States v. Stephens*, No. 11–3078, 2012 WL 4874857, at \*2–3 (3d Cir. Oct. 16, 2012); *United States v. Thomas*, 481 Fed. App'x 238, 239 (5th Cir. 2012); *Viator v. United States*, No. 12-61687-CIV, 2013 WL 3892957, at \*1 (S.D. Fla. July 26, 2013); *United States v. Davis*, No. 09 CR 765(RMB), 2013 WL 1793954, at \*1 (S.D.N.Y. Apr. 24, 2013); *LanDan v. United States*, 914 F. Supp. 2d 104, 104 (D. Mass. 2012); *United States v. Webb–Thompson*, 2012 WL 3683522, at \*1–2 (E.D.N.Y. Aug. 24, 2012) (upholding a waiver agreement as "presumptively enforceable. . . even in light of subsequent changes in the law that the defendant did not anticipate at the time of the plea agreement, as is the case here"). The reader may notice that many cases cited in this and the following section of this Note are unpublished decisions. The Second Circuit noted in *United States v. Harrison* that "[t]he fact that these decisions were made in so-called unpublished or non-precedential summary orders merely underscores the fact that the applicable law is altogether clear." *United States v. Harrison*, 699 F.3d 158, 159 (2d Cir. 2012). Courts are truly consistent in enforcing appeal waivers and, as the reader will see

defendants should have foreseen *Dorsey* and shaped their plea agreements accordingly.<sup>86</sup> Because courts refuse to allow an appeal barred by a plea agreement, direct appeal is not an effective way for defendants to seek re-sentencing under the FSA.

## B. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Defendants have also pursued re-sentencing under the FSA by raising ineffective assistance of counsel claims pursuant to 28 U.S.C. § 2255. Much like direct appeals however, courts have foreclosed this option. Courts consistently deny claims that defendants received ineffective assistance of counsel when negotiating their plea agreements, reasoning that attorneys could not have been expected to foresee the change in sentencing law that would be brought about by *Dorsey*.<sup>87</sup> This section discusses the analysis courts apply to ineffective assistance of counsel claims and then explains the result of that analysis for defendants seeking re-sentencing under the FSA.

Under 28 U.S.C. § 2255, a defendant convicted of a federal crime may challenge his or her sentence by alleging “that the sentence was imposed in violation of the Constitution or laws of the United States.”<sup>88</sup> A defendant may bring a claim that he or she received ineffective assistance of counsel under this statute because the Supreme Court has repeatedly stated that the Sixth Amendment right to counsel is the right to effective counsel.<sup>89</sup> Thus, a defendant may argue that because of the failings of his or her counsel, he or she was sentenced in violation of the Sixth Amendment and should be re-sentenced.<sup>90</sup>

---

below, in rejecting ineffective assistance of counsel claims connected with the Fair Sentencing Act.

86. See, e.g., *United States v. Riggi*, 649 F.3d 143, 150 n.7 (2d Cir. 2011) (stating that a “defendant’s inability to foresee that subsequently decided cases would create new appeal issues does not provide a basis for failing to enforce an appeal waiver”).

87. *Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013) (asserting that an attorney’s failure “to raise a claim . . . that undeniably would lose under current law but might succeed based on the outcome of a forthcoming Supreme Court decision” does not constitute ineffective assistance of counsel); *Lewis v. United States*, No. 3:13-CV-2176-D, 2013 WL 6869471, at \*3 (N.D. Tex. Dec. 30, 2013) (internal citations omitted) (“At the time of sentencing, such an objection to the application of the Sentencing Guidelines would have been meritless. [The defendant] was not ineffective for failing to urge the retroactive application of the FSA when Fifth Circuit law compelled otherwise.”).

88. 28 U.S.C. § 2255 (2008).

89. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

90. *Strickland*, 466 U.S. at 686; see *McMann*, 397 U.S. at 770-71.

Courts review claims of ineffective assistance of counsel under the two-step *Strickland* analysis.<sup>91</sup> First, the defendant must show that his or her counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed to the defendant by the Sixth Amendment.”<sup>92</sup> These errors must be so severe that the attorney’s assistance to the defendant at trial was not “reasonably effective.”<sup>93</sup> Second, the defendant must show that his or her counsel’s deficiency “prejudiced” the defense by making the defendant worse off than he or she would have been without the attorney’s failure.<sup>94</sup> A defendant must show both ineffective assistance and prejudice in order to prevail on an ineffective assistance of counsel claim.<sup>95</sup>

FSA-eligible defendants who seek re-sentencing often bring ineffective assistance of counsel claims. Those defendants argue that they fulfill the first step of the *Strickland* analysis because their counsel failed to argue for a sentence in accord with the FSA at the defendant’s initial sentencing.<sup>96</sup> Defendants argue that this failure rendered their counsel ineffective.<sup>97</sup> Defendants then assert that they fulfill the second step of the *Strickland* analysis because had their counsel argued for a sentence under the FSA, the defendants would have either been sentenced according to the FSA at their initial sentencing or would have preserved the argument for appeal after *Dorsey*.<sup>98</sup>

---

91. See, e.g., *United States v. Morgan*, CRIM. 09-0373, 2012 WL 3138018, at \*2 (E.D. La. Aug. 1, 2012).

92. *Strickland*, at 687.

93. *Id.*

94. *Id.*

95. *Id.*

96. See, e.g., *Dell v. United States*, 710 F.3d 1267, 1281–82 (11th Cir. 2013) (rejecting defendant’s argument that defense counsel’s failure to argue “for a downward variance based on the crack/powder disparity at sentencing” rendered his counsel deficient); *Ingram v. United States*, 541 Fed. App’x 707, 708 (7th Cir. 2013) (discussing defendant’s argument that his “counsel provided him constitutionally inadequate assistance when he failed to preserve an argument for application of the Fair Sentencing Act, a subject that was open in the Supreme Court at the time of [the defendant’s] sentencing”).

97. See, e.g., *Tinnin v. United States*, No. 1:12-cv-01360-SEB-MJD, 2013 WL 2407566, at \*2 (S.D. Ind. May 30, 2013) (internal quotations omitted) (“Tinnin alleges that his trial counsel was ineffective because he should have preserved an argument that Tinnin, sentenced after the Fair Sentencing Act was passed, should have been subject to the new penalties at the time of sentencing on December 2, 2010.”).

98. See, e.g., *Lewis v. United States*, No. 3:13-CV-2176-D, 2013 WL 6869471, at \*3 (N.D. Tex. Dec. 30, 2013) (arguing that counsel was ineffective for failing to “urge the retroactive application of the FSA” at the defendant’s initial sentencing). A defendant (who has not waived his right to appeal) may appeal only those arguments he raised at trial; arguments not raised at trial are considered waived and ineligible for review by an

Courts consistently reject such arguments on the “reasonably effective assistance” step of the *Strickland* analysis.<sup>99</sup> As the Western District of Michigan explained,

[T]he Fair Sentencing Act of 2010 . . . was signed into law only a month prior to the plea agreement, and it was reasonable for Counsel to not be fully aware of the nuances of the new act. Moreover, at the time of the plea agreement, the Amended Guidelines were still being revised and were not to take effect for another two months. Further, it would have been impossible for Counsel to anticipate that Congress was going to make the changes retroactive the following year.<sup>100</sup>

Courts have gone so far as to deem claims that an attorney should have argued for a sentence under the FSA “frivolous,”<sup>101</sup> or to suggest that the defendant was asking “clairvoyance” of his or her attorney.<sup>102</sup> Where the law of the circuit before *Dorsey* prohibited sentencing under the FSA, attorneys are not expected to have argued that the FSA applied to the defendant.<sup>103</sup>

It is worth noting that the doctrine surrounding appeal waivers and ineffective assistance of counsel claims creates a “catch-22” of sorts. As discussed in Part III.A of this Note, defendants are granted no sympathy for failing to predict *Dorsey* in the con-

---

appellate court. See, e.g., *Ortiz-Feliciano v. Toledo-Davila*, 175 F.3d 37, 41 (1st Cir. 1999); *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 609 (2d Cir. 1999); *F.D.I.C. v. Noel*, 177 F.3d 911, 916 (10th Cir. 1999).

99. See, e.g., *Sanders v. United States*, Civil No. 11-559-GPM, 2013 WL 1490989, at \*6 (S.D. Ill. Apr. 11, 2013) (quoting *United States v. Arvanitis*, 902 F.2d 489, 494 (7th Cir. 1990) (“An attorney’s incorrect estimate or inaccurate prediction of the applicable sentencing range does not constitute ineffective assistance of counsel.”)).

100. *Cole v. United States*, No. 1:11-cv-1309, 2012 WL 4470117, at \*5 (W.D. Mich. Sept. 27, 2012).

101. *Tinnin*, 2013 WL 2407566, at \*2 (internal quotations omitted) (“Tinnin alleges that his trial counsel was ineffective because he should have preserved an argument that Tinnin, sentenced after the Fair Sentencing Act was passed, should have been subject to the new penalties at the time of sentencing on December 2, 2010. This argument is frivolous. A failure of a lawyer to anticipate shifts in legal doctrine cannot be condemned as objectively deficient.”).

102. *United States v. Hogg*, 723 F.3d 730, 733 (6th Cir. 2013).

103. *Lewis*, 2013 WL 6869471, at \*3 (internal citations omitted) (“[A]t the time of sentencing, such an objection to the application of the Sentencing Guidelines would have been meritless. [The defendant] was not ineffective for failing to urge the retroactive application of the FSA when Fifth Circuit law compelled otherwise.”).

text of their appeal waivers.<sup>104</sup> Yet attorneys are exonerated from ineffective assistance of counsel claims because *Dorsey* was so unforeseeable.<sup>105</sup> Thus, *Dorsey* was both too foreseeable to exempt defendants from their appeal waivers and not foreseeable enough to implicate their attorneys. The Southern District of New York expressed its discomfort with this double standard:

There is no doubt that appeal/collateral attack waivers are, as a general rule, enforceable. . . . But there is absolutely no virtue in enforcing the waivers in the case of these defendants, who plainly were under a mistaken view of the law when they signed their plea agreements with the Government. So, for that matter, was the Government, and so was the Court.<sup>106</sup>

This double standard is rooted in a large body of cases that dictate that neither appeal waivers nor ineffective assistance of counsel claims are available to FSA-eligible defendants. However, to again quote the Southern District of New York, the fact that those two methods of re-sentencing are closed to FSA-eligible defendants “is *not* the end of the matter.”<sup>107</sup> That court concluded its opinion by ordering the government to show cause why the court should not re-sentence an FSA-eligible defendant under a third statute, 18 U.S.C. § 3582(c).<sup>108</sup>

### C. A POSSIBLE ALTERNATIVE: 18 U.S.C. § 3582(c)(2)

Section 3582(c)(2) allows re-sentencing when the Sentencing Guidelines range by which the defendant was originally sentenced has been retroactively amended.<sup>109</sup> Courts are split over whether to allow re-sentencing under § 3582(c)(2), leaving the

---

104. See, e.g., *Giddens v. United States*, No. 7:10-CR-28-001 (HL), 2012 WL 6628411, at \*2 (M.D. Ga. Nov. 28, 2012) (stating that the fact that the Supreme Court had not yet decided that the FSA applied to defendants like Giddens was “no reason[ ] . . . why he could not have raised these issues” at sentencing).

105. See, e.g., *Cole*, 2012 WL 4470117, at \*5 (stating that an attorney was not defective for failing to incorporate the Fair Sentencing Act into his arguments at the defendant’s initial sentencing because “it would have been impossible for Counsel to anticipate that Congress was going to make the changes retroactive the following year”).

106. *United States v. Bailey*, No. 10 Cr. 391(CM), 2013 WL 1828669, at \*3–4 (S.D.N.Y. Nov. 19, 2013).

107. *Id.* at \*5.

108. *Id.* at \*5–9.

109. 18 U.S.C. § 3582(c)(2) (2002).

doctrine unsettled at this time. To better understand the uncertainty surrounding this statute's application, this section begins with an explanation of § 3582(c)(2) and the analysis courts must conduct when deciding whether the statute applies in a given case. This section then explains the two different ways courts are applying that analysis to FSA-eligible defendants.

Section 3582(c)(2) allows courts to reduce a defendant's 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."<sup>110</sup> In other words, when the Sentencing Commission enacts a retroactive amendment to the Sentencing Guidelines, 18 U.S.C. § 3582(c)(2) authorizes district courts to revisit and reduce otherwise final sentences to reflect the new amendment.<sup>111</sup>

Courts must decide whether to reduce sentences affected by Guidelines amendments under a two-step analysis the Supreme Court outlined in *Dillon v. United States*.<sup>112</sup> A defendant must fulfill both steps of the analysis in order to be re-sentenced under § 3582(c)(2). First, a court must determine "the amended guideline range that would have been applicable to the defendant had the relevant amendment been in effect at the time of the initial sentencing."<sup>113</sup> Next, the court must consider a number of factors to determine whether a sentence reduction is appropriate in the case at hand.<sup>114</sup> Those factors are set forth in 18 U.S.C. § 3553(a).<sup>115</sup> They include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense . . . to afford adequate deterrence . . . to protect the public . . . and . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment . . . ; (3) the kinds of sentences available; (4) . . . the applicable category of offense committed by the applicable category of defendant set forth

---

110. *Id.*

111. *Id.* See also *Dillon v. United States*, 560 U.S. 817, 821 (2010).

112. *Dillon*, 560 U.S. at 821–26.

113. *Id.* at 827.

114. *Id.* at 822.

115. *Id.*

in the Guidelines issued by the Sentencing Commission . . . subject to any amendments made to such Guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into the amendments . . . ; (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . ; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.<sup>116</sup>

The second step of the *Dillon* analysis, by its nature, hinges on the individual circumstances of each case.<sup>117</sup> However, the first step depends only on whether the Sentencing Commission has retroactively amended the Sentencing Guidelines range by which the defendant was initially sentenced. Where such an amendment is in place, all courts deciding whether to re-sentence a defendant under § 3582 should find step one of the *Dillon* analysis fulfilled and proceed to step two.<sup>118</sup> Yet the courts have disagreed about whether the Fair Sentencing Act fulfills the first step.

Understanding how courts disagree over the first prong of the *Dillon* framework requires a deeper examination of the relevant Sentencing Guidelines. To begin, 18 U.S.C. § 3582(c)(2) gives courts the authority to re-sentence a defendant according to a

---

116. 18 U.S.C. § 3553(a) (2008).

117. *See, e.g.*, *United States v. Figueroa*, 714 F.3d 757, 761 (2d Cir. 2013) (denying § 3582(c)(2) relief because the defendant “had been disciplined five times while at the [detention center] for possessing intoxicants on two occasions, possessing a weapon on two occasions, and assaulting another inmate”); *United States v. Smith*, 595 F.3d 1322, 1323 (5th Cir. 2010) (denying re-sentencing because of the defendant’s “post-conviction disciplinary record of some 19 disciplinary actions”); *United States v. Lightfoot*, 626 F.3d 1092 (9th Cir. 2010) (denying re-sentencing because of defendant’s “insolence to custodial staff, fighting, threatening a staff member, threatening bodily harm, and refusing to work”); *United States v. Johnson*, 580 F.3d 567, 569 (7th Cir. 2009) (denying a sentence reduction where the defendant’s “extensive criminal history and repeated serious driving offenses showed that he posed a risk to the community”); *United States v. Lafayette*, 585 F.3d 435 (D.C. Cir. 2009) (denying re-sentencing because of defendant’s “refusal to accept responsibility for his offenses”); *Mock v. United States*, 632 F. Supp. 2d 323, 325 (S.D.N.Y. 2009) (allowing a sentence reduction where the defendant “completed over 5,000 hours in educational courses and a 40-hour Drug Awareness Program; and [had] received excellent work evaluations for his institutional work assignments and [was] regarded as a skilled, reliable employee”); *United States v. Davis*, 577 F. Supp. 2d 665, 667 (S.D.N.Y. 2008) (denying re-sentencing where the defendant “repeatedly stabbed a corrections officer in the head and neck with a sharpened piece of metal that had been fashioned into a knife-like weapon”).

118. 18 U.S.C. § 3582(c)(2) (2002).

retroactive Sentencing Guidelines amendment.<sup>119</sup> The list of retroactive amendments to the Sentencing Guidelines can be found in Section 1B1.10(c) of the Guidelines.<sup>120</sup> The list includes Amendment 750 parts A<sup>121</sup> and C,<sup>122</sup> which incorporate the Fair Sentencing Act's new, lower penalties for crack cocaine offenses.<sup>123</sup> The commentary to Amendment 750 explains that the Amendment is retroactive because the FSA "specified in its statutory text that its purpose was to 'restore fairness to Federal cocaine sentencing' and provide 'cocaine sentencing disparity reduction.'"<sup>124</sup>

The confusion arises because courts disagree about whether § 3582(c)(2) allows re-sentencing under both Guidelines Amendment 750 and the FSA's new, lower mandatory minimums or whether § 3582(c)(2) only allows re-sentencing under the Guidelines Amendment. It may be easier to understand the difference between these two readings of § 3582(c)(2) through an illustration. For example, assume, as some courts do, that defendants sentenced under the Sentencing Guidelines range later amended through Amendment 750 are eligible for re-sentencing under § 3582(c) but defendants sentenced under the pre-FSA statutory mandatory minimums are not.<sup>125</sup> This means that a defendant convicted of possessing five grams of crack cocaine, which triggered a five-year mandatory minimum sentence under the Anti-Drug Abuse Act,<sup>126</sup> is not eligible for re-sentencing under the FSA through § 3582(c)(2).<sup>127</sup> However, a defendant convicted of possessing four grams of crack cocaine, which did not trigger a man-

---

119. *Id.*

120. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(c) (2012).

121. *Id.* at app. C, amend. 750, pt. A. Part A of Amendment 750 amends the Drug Quantity Table in § 2D1.1 for crack cocaine.

122. *Id.* at app. C, amend. 750, pt. C (2011). Part C of Amendment 750 deletes the cross-reference in § 2D2.1(b) under which an offender who possessed more than five grams of crack cocaine was sentenced under § 2D1.1.

123. *Id.* at § 1B1.10(c).

124. *Id.* at amend. 750, pts. A, C, introductory comment. The Sentencing Commission also took the opportunity in the introduction to Amendment 750 to reiterate its own long-held view that the pre-FSA sentencing regime "significantly undermine[d]" congressional sentencing objectives including fairness and consistency. *Id.*

125. *See, e.g.,* United States v. Bennett, No. 3:10CR84, 2013 WL 170333, at \*9 (W.D.N.C. Jan. 16, 2013).

126. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (repealed 2010).

127. The FSA would impose no mandatory minimum sentence for possession of five grams of crack cocaine. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

datory minimum sentence under the Anti-Drug Abuse Act,<sup>128</sup> but warranted a Guidelines range of roughly four years,<sup>129</sup> does qualify for re-sentencing under § 3582(c)(2). By contrast, courts that allow § 3582(c)(2) re-sentencing under both the FSA and Guidelines Amendment 750 would re-sentence both the defendant who originally triggered a five-year mandatory minimum sentence and the defendant who did not.<sup>130</sup>

Courts that allow § 3582(c)(2) re-sentencing for defendants who triggered pre-FSA mandatory minimums justify their decision in two ways. First, they read Amendment 750 not as distinct from the FSA but as a method by which the FSA is put into practice.<sup>131</sup> Second, they note that allowing re-sentencing under both the FSA and Amendment 750 is “the only way to give effect to Congress’ intent to achieve consistency with other Guidelines provisions.”<sup>132</sup> Subscribing to this reasoning, many courts find defendants eligible for re-sentencing under § 3582(c)(2) whether they were sentenced according to statutory mandatory minimums

---

128. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (repealed 2010).

129. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 706 (2007).

130. *See, e.g.*, United States v. Mitchell, No. CR-09-108-RAW, 2012 WL 5874479, at \*2 (E.D. Okla. Nov. 19, 2010) (re-sentencing under § 3582(c)(2) where the defendant triggered the five-year mandatory minimum sentence under the pre-FSA sentencing statute).

131. *See, e.g.*, United States v. Price, No. 08-cr-30179-DRH, 2012 WL 3263577, at \*5 (S.D. Ill. Aug. 9, 2012) (re-sentencing under § 3582(c)(2), noting that “[t]he Court certainly understands the government’s concerns, considering that in general, defendants sentenced to a statutory mandatory minimum cannot have their sentences lowered by an amendment to the guidelines. . . . The court finds these cases distinguishable, however, because not only has defendant’s sentencing range been lowered by the Sentencing Commission, but the very statutory mandatory minimum upon which defendant was sentenced has either been eliminated or has changed based upon increased drug amounts needed to trigger the statutory mandatory minimum.”) (internal quotations omitted); United States v. Wolford, CRIM. 08-29, 2013 WL 3995008, at \*4 (W.D. Penn. Aug. 5, 2013) (re-sentencing defendant under the FSA. The court rejected the government’s argument that because “the recalculated lowered range is not the result of a guideline amendment but is a result of this Court’s error in failing to apply the Fair Sentencing Act at sentencing,” the defendant was ineligible for § 3582(c)(2) re-sentencing.).

132. United States v. Doe, 731 F.3d 518, 526 (6th Cir. 2013) (re-sentencing defendant under § 3582(c)(2) because “applying the new minimums in Defendant’s [Guidelines range] calculation is the only way to give effect to Congress’ intent to achieve consistency with other Guidelines provisions”). *See also, e.g.*, United States v. King, No. 99 CR 952-1, 2013 WL 4008629, at \*12 (N.D. Ill. August 5, 2013) (re-sentencing a defendant under § 3582(c)(2) because the FSA and corresponding Sentencing Guidelines were “the result of a major and protracted effort by courts and the Commission to remediate a law that had an unjust and racially discriminatory impact on the sentences imposed on thousands of defendants”).

lowered by the FSA or Sentencing Guidelines lowered by Amendment 750.<sup>133</sup>

In contrast, courts that refuse to re-sentence defendants under the FSA's new mandatory minimums emphasize that the Fair Sentencing Act is an act of Congress and not in and of itself an amendment to the Sentencing Guidelines.<sup>134</sup> Those courts read § 3582(c)(2) as creating a distinction between sentences “based on a sentencing range”<sup>135</sup> in the Sentencing Guidelines and sentences based on a statutory mandatory minimum.<sup>136</sup> Those courts conclude that defendants sentenced to the pre-FSA statutory mandatory minimums are ineligible for re-sentencing under § 3582(c)(2).<sup>137</sup> For example, one North Carolina district court denied a defendant re-sentencing under the FSA because

[t]he Supreme Court held [in *Dorsey*] that the more favorable mandatory minimums provided in the *statute* [the FSA] must be applied in post-FSA sentencings to pre-FSA conduct. . . . However, Section 3582(c)(2) only allows for the post-judgment reduction of a sentence when the advisory

---

133. See, e.g., *Doe*, 731 F.3d at 526 (re-sentencing defendant under § 3582(c)(2) because “applying the new minimums in Defendant’s [Guidelines range] calculation is the only way to give effect to Congress’ intent to achieve consistency with other Guidelines provisions”); *United States v. Barnett*, 490 Fed. App’x 170, 172 (10th Cir. 2012) (motion denied on other grounds) (assuming without deciding that defendant was eligible for re-sentencing under § 3582(c)(2) where he was originally sentenced to a pre-FSA statutory mandatory minimum that was lowered by the FSA); *United States v. Robinson*, No. 08-20537-1, 2013 WL 2898210, at \*1 (E.D. Mich. June 13, 2013) (“The old, repealed discriminatory minimums are no longer a part of the operation of the sentencing system. They should not be used to foreclose lowering the defendant’s applicable guideline range.”) (citing 18 U.S.C. § 3582(c)(2) (2002)).

134. See, e.g., *United States v. Hammond*, 712 F.3d 333, 334 (6th Cir. 2013) (stating that because the defendant’s Sentencing Guidelines range “has not subsequently been lowered by the Sentencing Commission . . . the district court had no authority to further reduce his sentence under § 3582(c)(2) to the new sixty-month mandatory minimum promulgated by the FSA”); *United States v. Bennett*, No. 3:10CR84, 2013 WL 170333, at \*9 (W.D.N.C. Jan. 16, 2013); *LanDan v. United States*, 914 F. Supp. 2d 104, 104–05 (D. Mass. 2012); *Brumfield v. United States*, No. 11-CV-679-WDS, 2012 WL 6595079, at \*3 (S.D. Ill. Dec. 18, 2012).

135. 18 U.S.C. § 3582(c)(2) (2002).

136. See, e.g., *United States v. Bell*, 731 F.3d 552, 555 (6th Cir. 2013) (denying re-sentencing because the FSA is a Congressional statute, not an amendment to the Sentencing Guidelines); *United States v. Hodge*, 721 F.3d 1279, 1281 (10th Cir. 2013) (“[T]he FSA does not provide an independent basis for a sentence reduction; only the statutory exceptions in 18 U.S.C. § 3582 provide such grounds.”).

137. 18 U.S.C. § 3582(c)(2).

guidelines range has been subsequently altered by the Sentencing Commission.<sup>138</sup>

These courts conclude that defendants sentenced under statutory mandatory minimums do not qualify for re-sentencing under § 3582(c)(2) but that defendants who do not trigger mandatory minimums are eligible for re-sentencing.<sup>139</sup>

If this reading of § 3582(c)(2) is correct, it seems that defendants sentenced between the FSA's enactment and *Dorsey* according to the 1986 Act's mandatory minimums are barred from re-sentencing under the FSA's new, lower mandatory minimums at every turn.<sup>140</sup> As this Note discussed above, FSA-eligible defendants are already denied re-sentencing through direct appeal and through ineffective assistance of counsel claims. If FSA-eligible defendants are also denied re-sentencing through § 3582(c)(2), defendants will be left without recourse and the Fair Sentencing Act of 2010 will not reach the thousands of defendants sentenced between its effective date and *Dorsey*.<sup>141</sup> The following section of this Note proposes a broader reading of § 3582(c)(2) that would preserve a path to re-sentencing under the FSA for these defendants.

---

138. *Bennett*, 2013 WL 170333 at \*9 (emphasis in original).

139. *See, e.g.*, *United States v. Passmore*, 503 Fed. App'x 340, 341 (6th Cir. 2012); *United States v. Little*, No. 10-20170, 2013 WL 5819629, at \*2 (E.D. Mich. Oct. 29, 2013); *Oten v. United States*, No. 3:12-CV-0343 (AVC), 2013 WL 5596016, at \*1 (D. Conn. Oct. 11, 2013); *Hughlett v. United States*, No. 1:13-CV-204, 2013 WL 5728733, at \*1 (E.D. Tenn. Oct. 22, 2013); *Bennett*, 2013 WL 170333 at \*10.

140. *See, e.g.*, *Cole v. United States*, No. 1:11-cv-1309, 2012 WL 4470117, at \*5 (W.D. Mich. Sept. 27, 2012) (denying re-sentencing based on ineffective assistance of counsel where counsel failed to argue for sentencing under the FSA or instruct the defendant to preserve his right to appeal for re-sentencing in light of a later amendment to the crack cocaine laws); *Tinnin v. United States*, No. 1:12-CV-01360-SEB-MJD, 2013 WL 2407566, at \*2 (S.D. Ind. May 30, 2013) (denying re-sentencing through direct appeal where defendant failed to argue for sentencing in light of the FSA at his initial sentencing).

141. PRELIMINARY CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT, *supra* note 37, at Table 2 (2013) (stating that as of December, 2013, 12,551 defendants have sought re-sentencing (through various means) under the FSA. Five thousand and fifty-five of those defendants were denied re-sentencing (for various reasons)). The Sentencing Commission has not kept complete records of when each defendant was originally sentenced, with what statute he or she sought re-sentencing, and why it was denied. While the statistics are not perfect, they are enough to illustrate the gravity of the issue.

## IV. PROPOSED SOLUTION

With re-sentencing foreclosed through direct appeal and ineffective assistance of counsel claims, § 3582(c)(2) is the most promising means of achieving re-sentencing for defendants with pre-FSA offenses and post-FSA conduct. FSA-eligible defendants should be able to seek re-sentencing under § 3582(c)(2) based on both the text of § 3582(c)(2) and the congressional intent behind the FSA.

## A. SECTION 3582(C)(2) APPLIES TO BOTH THE FSA AND GUIDELINES AMENDMENT 750

Whether FSA-eligible defendants may seek re-sentencing through § 3582(c)(2) depends on an interpretation of the language of § 3582(c)(2). Section 3582(c)(2) allows re-sentencing when a defendant was originally sentenced “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.”<sup>142</sup> If the FSA, which directed the Sentencing Commission to incorporate the new, lower mandatory minimums for crack offenses into the Sentencing Guidelines,<sup>143</sup> is included in the concept of a “sentencing range . . . subsequently . . . lowered by the Sentencing Commission,” then FSA-eligible defendants may seek re-sentencing under § 3582(c)(2).<sup>144</sup> If the concept of a “sentencing range . . . subsequently . . . lowered by the Sentencing Commission” includes only amendments to the Sentencing Guidelines and not the statutes that mandated them, then FSA-eligible defendants may not seek re-sentencing under § 3582(c)(2).<sup>145</sup> FSA-eligible defendants do qualify for re-sentencing under § 3582(c)(2) based on the relationship between the FSA and Sentencing Guidelines Amendment 750 (discussed directly below) and the Supreme Court’s analysis of the interaction between the FSA and Guidelines Amendment 750 (discussed in response to the counterargument posed in section IV.A).

It is important to understand at the outset of this discussion that the mandatory minimum sentences lowered by the Fair Sentencing Act were incorporated into the Sentencing Guidelines

---

142. 18 U.S.C. § 3582(c)(2).

143. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 § 8(2) (2010).

144. 18 U.S.C. § 3582(c)(2).

145. *Id.*

through Guidelines Amendment 750.<sup>146</sup> The arguments courts have made for denying § 3582(c)(2) re-sentencing under the FSA suggest that the difference in question is between mandatory minimum sentences set by congressional statute and different, contrasting guideline ranges set by the Sentencing Commission. That is a seductively simple characterization. In actuality, the FSA and Guidelines Amendment 750 apply identical sentences to identical defendants.<sup>147</sup> Any difference in how they are applied would thus be based on a superficial, and not substantive, difference between the two sentencing tools.

It is easiest to see the identical nature of the two sentencing tools by focusing on the numbers. For example, the Fair Sentencing Act set the amount of crack cocaine necessary to trigger a five-year mandatory minimum sentence at 28 grams.<sup>148</sup> Sentencing Guidelines Amendment 750 sets the minimum possible sentence for a defendant convicted of possessing 28 grams of crack cocaine at five years.<sup>149</sup> Where a defendant is convicted of possessing more or less crack cocaine than would trigger a mandatory minimum under the FSA, the Sentencing Guidelines call for a sentence in proportion with the FSA's mandatory minimums.<sup>150</sup> For example, a defendant convicted of possessing 27 grams of crack cocaine triggers no mandatory minimum sentence but warrants a minimum sentence under the Sentencing Guidelines of four years and three months—slightly less than the minimum

---

146. U.S. SENTENCING GUIDELINES MANUAL amend. 750 (2011).

147. See *infra* notes 166–69 and accompanying text for a comparison of the sentences imposed by the FSA and Sentencing Guideline Amendment 750.

148. Fair Sentencing Act § 2(a)(2)–(3). Before the FSA was enacted, possession of only five grams of crack cocaine triggered a five-year mandatory minimum sentence. Controlled Substances Act, 21 U.S.C. § 844(a) (1970), amended by Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, § 2(a)(2)–(3) (2010) (“Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of \$1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams.”).

149. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 750 (2011) (“To account for these statutory changes [meaning the Fair Sentencing Act] . . . the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32.”). The Sentencing Table in the Sentencing Guidelines Manual shows that a base offense level of twenty-six mandates a sentence of 63 to 78 months—five to 6.5 years.

150. *Id.* at § 2D1.1(c) (2013) (listing quantities of crack cocaine and the base offense levels they trigger. The base offense levels correspond to the Sentencing Table in the Sentencing Guidelines Manual. Greater amounts of crack cocaine trigger higher base offense levels, which mandate longer sentencing ranges).

sentence for possessing 28 grams of crack cocaine.<sup>151</sup> The FSA<sup>152</sup> and Amendment 750<sup>153</sup> call for identical sentences for defendants who trigger mandatory minimum sentences and proportional sentences for defendants who do not.

Guidelines Amendment 750 was enacted not to be distinct from the FSA, but to be an extension of the FSA, accounting for details not included in the language of the FSA and ensuring that the sentencing system as a whole is consistent.<sup>154</sup> To allow § 3582(c)(2) re-sentencing under Guidelines Amendment 750 but deny it under the FSA's new mandatory minimums would amount to treating defendants differently because they were convicted of possessing 27 or 28 grams of crack cocaine. To do so would fail to see that the FSA and Guidelines Amendment 750 are a cohesive, interdependent sentencing structure.<sup>155</sup>

Proclaiming that the FSA as incorporated into the Sentencing Guidelines makes defendants eligible for re-sentencing under § 3582(c)(2) would recognize the realities of the way our nation's sentencing regime functions. Courts should avoid an empty distinction between defendants who trigger the FSA's mandatory

---

151. *Id.* at § 2D1.1(c)(8) (2013) (stating that possession of between 22.4 and 28 grams of crack cocaine triggers a base offense level of twenty-four); *id.* at sentencing table. (2013) (stating that a base offense level of twenty-four warrants a sentencing range between 51 and 63 months, which translates to between 4.25 and 5.25 years).

152. Fair Sentencing Act § 2(a)(2)–(3).

153. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 750 (2011) (amending Sentencing Guidelines Manual § 2D1.1, which assigns possession of amounts of crack cocaine “base offense levels,” which dictate a defendant’s sentencing range, to reflect the FSA’s new mandatory minimum sentences and adjusting the sentences for possession of all quantities of crack cocaine to be proportional to the mandatory minimums).

154. Fair Sentencing Act § 8 (“The United States Sentencing Commission shall (1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable . . . and (2) . . . make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.”).

155. This view has gained the support of some courts. For example, one New York court described “inescapable interplay between the Sentencing Guidelines and statutory mandatory minima” and asserted that “the Guidelines and certain statutes are in partnership with each other. When one changes, the other must often adjust as well.” *United States v. Bailey*, No. 10 Cr. 391(CM), 2013 WL 6144763, at \*6 (S.D.N.Y. Nov. 19, 2013) (citing *United States v. Bethea*, 735 F.3d 86 (2d Cir. 2013)). In *United States v. Bethea*, the Second Circuit granted re-sentencing under § 3582(c)(2) where the defendant was subject to a five-year mandatory minimum sentence under the pre-FSA sentencing regime but no mandatory minimum under the FSA. *Bethea*, at 88. The defendant’s sentencing guidelines range under the FSA was three years and one month to three years and ten months. *Id.* The Second Circuit directed the district court on remand to sentence her according to the lower guidelines. *Id.* As this case illustrates, whether the defendant is allowed re-sentencing under § 3582(c)(2) can make a significant difference in the time a person spends in prison.

minimums (those convicted of possessing 28 grams of crack cocaine, for example)<sup>156</sup> and defendants who fall below those minimums but within the ambit of the Sentencing Guidelines (those convicted of possessing 27 grams of crack cocaine, for example).<sup>157</sup> More importantly, avoiding that distinction is necessary to honor the legislative intent behind the FSA, a subject further discussed in response to the first counterargument posed below.

There are two main counterarguments to this application of § 3582(c)(2). The first objection is that a formal reading of the text of § 3582(c)(2) requires that the FSA and the Sentencing Guidelines be treated differently. The second objection asserts that even if § 3582(c)(2) allows re-sentencing under the FSA, any defendant who entered into a plea agreement is ineligible for re-sentencing under its terms. The following sections address each counterargument in turn.

#### B. COUNTERARGUMENT I: A FORMAL INTERPRETATION OF § 3582(C)(2) PROHIBITS RE-SENTENCING UNDER THE FSA

A formalist might argue that even if there is only a superficial difference between the FSA and Amendment 750, that superficial difference exists for a reason and should not be discounted.<sup>158</sup> Professor Leiter of the University of Chicago explains the formalist style of statutory interpretation as “presenting the binding rules of law as given by the materials correctly interpreted and as then requiring, as a matter of logic, a particular decision.”<sup>159</sup> Under that analytical style, a law should be enforced based on the

---

156. Fair Sentencing Act § 2(a)(2)–(3).

157. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(8) (2013) (stating that possession of between 22.4 and 28 grams of crack cocaine triggers a base offense level of twenty-four); *Id.* at sentencing table (2013) (stating that a base offense level of twenty-four warrants a sentencing range between 51 and 63 months, which translates to between 4.25 and 5.25 years).

158. See, e.g., *United States v. Passmore*, 503 Fed. App'x 340, 341 (6th Cir. 2012); *United States v. Barnett*, 490 Fed. App'x 170, 172 (10th Cir. 2012); *United States v. Little*, No. 10-20170, 2013 WL 5819629, at \*2 (E.D. Mich. Oct. 29, 2013); *Hughlett v. United States*, Nos. 1:13-CV-204, 2013 WL 5728733, at \*1 (E.D. Tenn. Oct. 22, 2013); *Oten v. United States*, No. 3:12-CV-0343 (AVC), 2013 WL 5596016, at \*1 (D. Conn. Oct. 11, 2013).

159. Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 LEGAL THEORY 111, 112 (2010). See also STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 3 (Vicki Been et al. eds., 2d ed. 1995) (“[L]egal reasoning should . . . determine all specific actions required by the law based only on objective facts, unambiguous rules, and logic.”); William Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646 (1990) (“Formalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute.”).

language on the law's face alone.<sup>160</sup> The formalist analytical framework differs from the legal realist style, which might interpret a law in light of its legislative history or social implications.<sup>161</sup>

Courts that use an analysis like Professor Leiter's to apply § 3582(c)(2) to defendants seeking re-sentencing under the FSA refer first to the text of § 3598(c)(2) itself.<sup>162</sup> Those courts point out § 3582(c)(2)'s language, which allows re-sentencing for defendants "sentenced to a term of imprisonment based on a *sentencing range* that has subsequently been lowered by the *Sentencing Commission*."<sup>163</sup> Courts using a formalist analysis argue that that language, when applied to crack cocaine defendants, draws a line between defendants sentenced according to the pre-FSA Sentencing Guidelines and those sentenced according to the pre-FSA mandatory minimums (a term of imprisonment "based on" statute rather than guidelines), allowing re-sentencing under § 3582(c)(2) for the former but denying it for the latter.<sup>164</sup> A formalist like Professor Leiter might assert that a court should end its analysis with that distinction and deny re-sentencing for all defendants sentenced according to pre-FSA mandatory minimums.

However, even under a strictly formal analysis, a court deciding whether to re-sentence an FSA-eligible defendant under § 3582(c)(2) should not rely solely on the language in § 3582(c)(2) because § 3582(c)(2) is not the only statute at issue. A formalist court should look at the language of *all* applicable laws before coming to a legal conclusion. When deciding whether to re-

---

160. Leiter, *supra* note 159, at 111.

161. *Id.* at 111. (explaining that under the formalist style, "the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy," while under the legal realist style, a judge can appeal to fairness, economics, or public policy to come to a decision).

162. See, e.g., *United States v. Kelly*, 716 F.3d 180, 180 (5th Cir. 2013) ("Pursuant to § 3582(c)(2), a defendant's sentence may be modified if he was sentenced to 'a term of imprisonment based on a sentencing range that subsequently was lowered by the Sentencing Commission.' . . . A reduction under § 3582(c)(2) is not authorized if an amendment does not lower the guidelines range due to, for example, the operation of a statutory mandatory minimum sentence.").

163. 18 U.S.C. § 3582(c)(2) (2002) (emphasis added). See also, e.g., *United States v. Mowatt*, 736 F. Supp. 2d 216, 217–18 (D.C. Cir. 2010); *United States v. Tejada*, 978 F. Supp. 2d 245, 249 (S.D.N.Y. 2013).

164. See, e.g., *United States v. Carpenter*, 396 Fed. App'x 743, 745 (2d Cir. 2010) ("District courts are constrained in their ability to modify a sentence under § 3582(c)(2) if the court has imposed a statutory mandatory minimum sentence.").

sentence an FSA-eligible defendant under § 3582(c)(2), this means the court must look to both § 3582(c)(2) and the language of the FSA itself. Courts that look only at the phrases “sentencing range” and “Sentencing Commission” in § 3582(c)(2) miss half of the formal analysis because they fail to also glean rules from the language of the FSA.<sup>165</sup> The Supreme Court already pinpointed the legal rules set forth in the FSA in *Dorsey v. United States*.<sup>166</sup> Because the Supreme Court’s interpretation of the FSA in *Dorsey* is binding on the lower courts, a formalist may refer to *Dorsey* for the relevant legal rules.

In *Dorsey*, the Supreme Court concluded that the FSA applied to all crack cocaine defendants sentenced after the FSA was enacted regardless of the date of their offense.<sup>167</sup> The Supreme Court gave six reasons for deriving this legal rule from the FSA, one of which deals directly with the interaction between the Sentencing Guidelines and the FSA’s mandatory minimums.<sup>168</sup> The court noted that if Sentencing Guidelines Amendment 750 were applied retroactively to all defendants sentenced after the FSA’s enactment, but the FSA’s mandatory minimums were not applied as such, that would not only perpetuate but also exacerbate a disparate sentencing regime.<sup>169</sup> The Court explained with a hypothetical much like the one this Note used above<sup>170</sup> to illustrate the difference (or lack thereof) between the FSA’s mandatory

165. *Id.*

166. *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

167. *Id.* at 2331–35 (“First, the 1871 saving statute permits Congress to apply a new Act’s more lenient penalties to pre-Act offenders without saying so in the new Act. . . . Second, the Sentencing Reform Act sets forth a special and different background principle . . . ‘determining the particular sentence to be imposed’ . . . the sentencing court ‘shall consider’ . . . the ‘sentencing range’ established by the Guidelines that are ‘in effect on the date the defendant is sentenced.’ . . . Third, language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act background principle here. . . . Fourth, applying the 1986 Drug Act’s old mandatory minimums to the post-August 3 sentencing of pre-August 3 offenders would create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. . . . Fifth, not to apply the Fair Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse [by creating] new anomalies . . . not previously present. . . . Sixth, we have found no strong countervailing consideration.”).

168. *Id.* at 2334 (“[N]ot to apply the Fair Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse” by creating “new anomalies . . . because sentencing courts must apply new Guidelines (consistent with the Fair Sentencing Act’s new minimums) to pre-Act offenders . . . and the 1986 Drug Act’s old minimums would trump those new Guidelines for some pre-Act offenders but not for all of them.”).

169. *Id.*

170. *See supra* notes 122–27 and accompanying text.

minimums and Sentencing Guidelines Amendment 750. Imagine a defendant (“Defendant A”) is convicted of possessing four grams of crack cocaine.<sup>171</sup> Defendant A committed his crime before the FSA was enacted and was sentenced after the FSA was enacted but according to the pre-FSA sentencing regime.<sup>172</sup> Four grams was not enough to trigger a mandatory minimum sentence under the pre-FSA sentencing regime,<sup>173</sup> but the Sentencing Guidelines at the time would have dictated a sentence between 41 and 51 months.<sup>174</sup> Once the Sentencing Commission promulgated Amendment 750, Defendant A could petition for § 3582(c)(2) re-sentencing<sup>175</sup> and receive a sentence according to the new Guidelines: a sentence between 21 and 27 months.<sup>176</sup>

The Court then posited that Defendant B committed an offense identical to Defendant A’s but for the fact that he possessed one more gram of crack cocaine than Defendant A.<sup>177</sup> Possessing five grams of crack cocaine instead of four would have triggered a mandatory minimum sentence of five years under the pre-FSA sentencing regime.<sup>178</sup> Thus Defendant B would have been sentenced according to a statutory mandatory minimum sentence

---

171. *Dorsey*, 132 S. Ct. at 2334.

172. *Id.* at 2334.

173. Controlled Substances Act, 21 U.S.C. § 844(a) (1970), amended by Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, § 2(a)(2)–(3) (2010) (“Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of \$1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance *exceeds 5 grams.*”) (emphasis added).

174. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 706 (2007) (stating that possession of at least four grams but less than five grams of crack cocaine triggers an offense level of twenty-two, which translates to a Sentencing Guidelines range of 41 to 51 months for a first-time offender. These were the crack cocaine-related Guidelines in effect directly before the FSA and Amendment 750 were enacted).

175. 18 U.S.C. § 3582(c)(2) (2002) (allowing courts to re-sentence defendants whose Sentencing Guidelines ranges are later retroactively amended).

176. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(12) (2011) (stating that possession of four grams of crack cocaine triggers an offense level of sixteen, which translates to a Sentencing Guidelines range of 21 to 27 months for a first-time offender. These are the crack cocaine-related Guidelines currently in effect, after the enactment of the FSA and Guidelines Amendment 750).

177. *United States v. Dorsey*, 132 S. Ct. 2321, 2334 (2012).

178. Controlled Substances Act § 844(a), *amended by* Fair Sentencing Act § 2(a)(2)–(3) (“Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of \$1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams.”).

instead of the Sentencing Guidelines.<sup>179</sup> If the FSA's new statutory scheme were not applicable to pre-Act offenders with post-Act sentences, Defendant B would be ineligible for re-sentencing.<sup>180</sup>

In this hypothetical, Defendant A would be granted a sentence of two years but Defendant B would be required to serve his original five-year sentence.<sup>181</sup> That means that Defendant B would serve three years more than Defendant A for possessing one more gram of crack cocaine, whereas under the pre-FSA sentencing regime possessing one more gram of crack cocaine triggered (a more proportional) one more year of imprisonment.<sup>182</sup> The Court concluded, "[A]pplication of the [pre-FSA] minimums to pre-Act offenders sentenced after the new Guidelines take effect would produce a crazy quilt of sentences, at odds with Congress' basic efforts to achieve more uniform, more proportionate sentences. Congress . . . could not have intended any such result."<sup>183</sup> The Court concluded that, consistent with Congress' intent,<sup>184</sup> the FSA must apply to *all* defendants sentenced after the FSA was enacted in a way that does not yield inconsistency with the Sentencing Guidelines.<sup>185</sup> With that conclusion, the Supreme Court identified the legal rule in the language of the FSA that lower courts must apply: the FSA demands consistent treatment of all defendants who were originally sentenced after the passage of the FSA.

Accordingly, a proper formalist analysis of the interaction between § 3582(c)(2) and the FSA has three steps. First, identify binding rules from the FSA. The lower courts are bound by the Supreme Court's interpretation of the FSA. The Supreme Court has held that the FSA must apply to all pre-Act offenders with

---

179. *Id.*

180. *Dorsey*, 132 S. Ct. at 2334.

181. *Id.*

182. *Id.*

183. *Id.* at 2334–35.

184. 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin, Chairman, Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary) ("[T]his legislation is about fixing an unjust law that has taken a great human toll."); *see also id.* at S10,492 (statement of Sen. Jefferson Sessions) ("[T]he current system is not fair and . . . we are not able to defend the sentences that are required to be imposed under the law today."); *see also id.* at S10,491 (statement of Sen. Patrick Leahy) ("I hope that this legislation will finally enable us to address the racial imbalance that has resulted from the cocaine sentencing disparity, as well as to make our drug laws more fair, more rational, and more consistent with our core values of justice.")

185. *Dorsey*, 132 S. Ct. at 2335.

post-Act conduct in the same way as the Sentencing Guidelines, lest the FSA create a “crazy quilt of sentences, at odds with Congress’ basic efforts to achieve more uniform, more proportionate sentences.”<sup>186</sup> To parse out differences between the FSA and the Guidelines would contradict the binding rule the Supreme Court has already set forth.

Step two of the analysis asks courts to identify binding rules in § 3582(c)(2). Section 3582(c)(2) allows courts to re-sentence defendants whose applicable Guidelines ranges are later amended.<sup>187</sup> Step three is to draw a logical conclusion from those rules.<sup>188</sup> The logic is clear: the FSA applies to all pre-Act offenders with post-Act conduct in the same way as the Sentencing Guidelines. Thus, because defendants who were sentenced under the pre-FSA Sentencing Guidelines may seek re-sentencing under Sentencing Guidelines Amendment 750,<sup>189</sup> defendants who were sentenced according to the analogous pre-FSA statutory mandatory minimums may seek re-sentencing under the FSA in the same way. A formalist who applies all of the relevant rules of law would conclude that all FSA-eligible defendants should be able to seek re-sentencing under § 3582(c)(2).

### C. COUNTERARGUMENT II: PLEA AGREEMENTS MAY BAR RE-SENTENCING UNDER § 3582

An alternative counterargument suggests that even if defendants may seek § 3582(c)(2) re-sentencing under the FSA, that route is rendered powerless by plea agreements. Consistent with that view, some courts have argued that a defendant who enters into a plea agreement is, strictly speaking, sentenced according to his plea agreement, not according to the Sentencing Guidelines.<sup>190</sup> Thus, such a defendant was not sentenced “based on a

---

186. *Id.* at 2334–35.

187. 18 U.S.C. § 3582(c)(2) (2002).

188. Leiter, *supra* note 159 at 111; *see also* BURTON, *supra* note 159; Eskridge, *supra* note 159.

189. 18 U.S.C. § 3582(c)(2).

190. *See, e.g.*, United States v. Graham, 704 F.3d 1275 (10th Cir. 2013) (“Graham’s sentence was not based on a Guideline sentencing range but on the terms of his plea agreement.”); United States v. Duvall, 705 F.3d 479, 484 (D.C. Cir. 2012); United States v. Weatherspoon, 696 F.3d 416, 423 (3d Cir. 2012) (asserting that in order to seek re-sentencing through § 3582(c)(2), a defendant “must show that his agreement both identifies a Guidelines range and demonstrates a sufficient link between that range and the recommended sentence”); United States v. Rivera-Martínez, 665 F.3d 344, 349 (1st Cir.

sentencing range that has subsequently been lowered by the Sentencing Commission” as § 3582(c)(2) requires.<sup>191</sup> Since only defendants sentenced according to a later-amended Sentencing Guidelines range may seek re-sentencing through § 3582(c)(2), defendants sentenced “according to” their plea agreements would be ineligible. The Supreme Court recently discussed the interaction between plea agreements and § 3582(c)(2) in *Freeman v. United States*.<sup>192</sup> This Part provides some necessary background about plea agreements before discussing the *Freeman* decision.

When a prosecutor and a defendant negotiate a plea deal, they must submit it to the court for approval before it becomes final.<sup>193</sup> After addressing the defendant to determine that the plea is knowing<sup>194</sup> and voluntary<sup>195</sup> and confirming that there is a factual basis for the plea,<sup>196</sup> the court must “accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.”<sup>197</sup> The Federal Rules of Criminal Procedure list three terms to which the prosecutor may agree in a plea agreement.<sup>198</sup> The term most relevant to this Note is that the government “will agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provi-

---

2011) (denying re-sentencing because the court “cannot identify a referenced sentencing range from the Agreement alone”); *United States v. Green*, 595 F.3d 432, 437 (2d Cir. 2010) (holding that the defendant’s sentence was “based on” his plea agreement, not on a subsequently lowered Sentencing Guidelines range); *United States v. Ray*, 598 F.3d 407, 410 (7th Cir. 2010) (“[T]he sentence imposed under a plea bargain rests firmly on the parties’ agreement.”); *United States v. Williams*, 609 F.3d 368, 371 (5th Cir. 2010) (“[S]entences pursuant to Rule 11(c)(1)(C) plea agreements are not ‘based on’ the Guidelines for the purposes of § 3582(c)(2).”).

191. 18 U.S.C. § 3582(c)(2).

192. *Freeman v. United States*, 131 S. Ct. 2685 (2011).

193. FED. R. CRIM. P. 11(b)(1).

194. *Id.*

195. FED. R. CRIM. P. 11(b)(2).

196. FED. R. CRIM. P. 11(b)(3).

197. FED. R. CRIM. P. 11(c)(3)(A). The pre-sentence report is an “investigation of a defendant” put together by a probation officer, recommending a particular sentence for the defendant. 18 U.S.C. § 3552(a) (1990).

198. FED. R. CRIM. P. 11(c)(1)(A)–(C). Section (c)(1)(A) states that the government will “not bring, or will move to dismiss, other charges.” Section (c)(1)(B) states that 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 (such a recommendation or request does not bind the court).” Section (c)(1)(C) states that the government will “agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).”

sion of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply.”<sup>199</sup> It is known as a “(C) plea.”

The Supreme Court addressed the applicability of § 3582(c)(2) to (C) pleas in *Freeman v. United States*.<sup>200</sup> The Court’s discussion centered on the language in § 3582(c)(2) allowing defendants sentenced “based on” the Sentencing Guidelines to seek re-sentencing if the applicable Guidelines range is later amended.<sup>201</sup> The Justices produced a fractured opinion, disagreeing about whether defendants who enter into plea agreements are sentenced “based on” the Sentencing Guidelines or on their plea agreement alone.<sup>202</sup>

The four-Justice plurality held that all (C) pleas are “based on” the Sentencing Guidelines and thus eligible for re-sentencing under § 3582(c)(2) because 18 U.S.C. § 3552(a),<sup>203</sup> the Federal Rules of Criminal Procedure,<sup>204</sup> and Sentencing Guideline section 6B1.2<sup>205</sup> all require courts to consider the Sentencing Guidelines before accepting a plea agreement.<sup>206</sup> The four-Justice dissent held that defendants who enter into (C) pleas are never eligible for re-sentencing under § 3582(c)(2) because their sentences are based on an agreement between the defendant and the government, not the Sentencing Guidelines.<sup>207</sup> Justice Sotomayor

---

199. FED. R. CRIM. P. 11(c)(1)(C).

200. *Freeman v. United States*, 131 S. Ct. 2685 (2011).

201. *Id.*

202. *Id.*

203. *Id.* at 2692 (federal sentencing law requires the district judge in every case to impose “a sentence sufficient, but not greater than necessary, to comply with” the purposes of federal sentencing, in light of the Guidelines and other § 3553(a) factors”) (quoting 18 U.S.C. § 3553(a) (2010)).

204. *Id.* (“Rule 11(c)(1)(C) makes the parties’ recommended sentence binding on the court ‘once the court accepts the plea agreement,’ but the governing policy statement confirms that the court’s acceptance is itself based on the Guidelines.”) (citing U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (2013)).

205. *Id.* (“The commentary to § 6B1.2 advises that a court may accept an 11(c)(1)(C) agreement ‘only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons.’”).

206. *Id.* at 2691 (“In every case the judge must exercise discretion to impose an appropriate sentence. This discretion, in turn, is framed by the Guidelines. And the Guidelines must be consulted, in the regular course, whether the case is one in which the conviction was after a trial or after a plea, including a plea pursuant to an agreement that recommends a particular sentence.”).

207. *Id.* at 2701–05 (Roberts, C.J., dissenting) (agreeing with Justice Sotomayor’s concurrence that “the term of imprisonment imposed pursuant to a (C) agreement is, for purposes of § 3582(c)(2), ‘based on’ the agreement itself,” but concluding that the defend-

wrote a concurrence between the two extremes, and most circuits have followed her opinion.<sup>208</sup> She asserts that “[t]o ask whether a particular term of imprisonment is ‘based on’ a Guidelines sentencing range is to ask whether the range serves as the basis or foundation for the term of imprisonment.”<sup>209</sup> Under Justice Sotomayor’s opinion, it is not enough that the Sentencing Guidelines “instruct . . . a district court to use the Guidelines as a yardstick in deciding whether to accept a (C) agreement.”<sup>210</sup> Thus not all (C) plea agreements are by their nature “based on” the Sentencing Guidelines.<sup>211</sup> However, “[a]s long as that sentencing range is evident from the agreement itself, for purposes of § 3582(c)(2) the term of imprisonment imposed by the court in accordance with that agreement is ‘based on’ that range.”<sup>212</sup>

*Freeman* only bars § 3582(c)(2) relief for defendants whose plea agreements deviated from the pre-FSA Sentencing Guidelines. Justice Sotomayor states that a plea agreement is “based on” the Sentencing Guidelines when the plea agrees to a sentence “within a particular Guidelines sentencing range.”<sup>213</sup> If the prosecutor and the defendant use the Sentencing Guidelines as a starting point in their negotiations but then deviate from the ap-

---

ant must “take the bitter with the sweet” and adhere to his or her plea agreement even if the agreement references the Sentencing Guidelines).

208. See *United States v. Weatherspoon*, 696 F.3d 416, 422 (3d Cir. 2012); *United States v. Dixon*, 687 F.3d 356, 359–60 (7th Cir. 2012); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012); *United States v. Austin*, 676 F.3d 924, 927 (9th Cir. 2012); *United States v. Rivera-Martínez*, 665 F.3d 344, 348 (1st Cir. 2011), *cert. denied*, 133 S. Ct. 212 (2012); *United States v. Brown*, 653 F.3d 337, 340 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1003 (2012); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011). *But see United States v. Epps*, 707 F.3d 337, 350–51 (D.C. Cir. 2013) (“[T]here is no controlling opinion in *Freeman* because the plurality and concurring opinions do not share common reasoning whereby one analysis is a ‘logical subset’ of the other. The plurality rejects the concurring opinion’s approach . . . as incompatible with its own.”). Concluding that no *Freeman* opinion was controlling because each lacked five Justices’ support, the Epps court then found Justice Kennedy’s opinion the most persuasive and applied it. *Id.* at 351. See also Harvey Gee, *Striving for Equal Justice: Applying the Fair Sentencing Act of 2010 Retroactively*, 49 Wake Forest L. Rev. 207, 218 (2014) (citing *Epps* and arguing that courts should apply Justice Kennedy’s plurality opinion in *Freeman* to career offenders seeking re-sentencing under Sentencing Guidelines Amendment 750, which incorporated the Fair Sentencing Act into the Sentencing Guidelines).

209. *Freeman*, 131 S. Ct. at 2695 (Sotomayor, J., concurring).

210. *Id.* at 2696.

211. *Id.*

212. *Id.* at 2697–8.

213. *Id.* at 2697. Justice Sotomayor further explains that “when the agreement itself employs the particular Guidelines sentencing range applicable to the charged offenses in establishing the term of imprisonment, the defendant is eligible to have his sentence reduced under § 3582(c)(2).” *Id.* at 2698.

plicable Guidelines range because of other factors, like the defendant's cooperation throughout the investigation, the final sentence agreed to in the plea agreement is not "based on" the Sentencing Guidelines. However, if the prosecutor and the defendant agree at the end of their negotiations that the defendant should be sentenced within the applicable Sentencing Guidelines range, the plea agreement *is* "based on" the Sentencing Guidelines. Thus, defendants who entered into Rule 11(c)(1)(C) plea agreements are still eligible for re-sentencing under § 3582(c)(2) under Justice Sotomayor's opinion if they were sentenced within the Sentencing Guidelines range applicable at the time.

Therefore, *Freeman* only prohibits re-sentencing where the plea agreement deviated from the Sentencing Guidelines in effect at the time. Fortunately, most plea agreements involving the pre-FSA crack cocaine laws that deviate from the Sentencing Guidelines dictate sentences lower than the Guidelines recommend—a sign of the widespread feeling before the FSA was enacted that the crack cocaine laws were unjustly harsh.<sup>214</sup> In fact, many plea agreements preserve the defendant's right to appeal if the sentence imposed is above the applicable Guidelines range.<sup>215</sup>

---

214. See, e.g., *United States v. Savani*, 733 F.3d 56, 57 (3d Cir. 2013) ("[T]he appellant was convicted of a cocaine base (crack) related offense, the government moved for a downward departure . . . and the District Court granted the departure and sentenced the defendant below the statutory mandatory minimum."); *United States v. Ayers*, 938 F. Supp. 2d 108, 114 (D.D.C. 2013) (enforcing the defendant's plea agreement, which "awarded defendant a sentence (84 months) well below his recommended guideline sentence (120 to 150 months)"); *United States v. Ingram*, 908 F. Supp. 2d 1, 2 (D.D.C. 2012) (sentencing the defendant to "thirteen years' (156 months) imprisonment" where the applicable Guidelines range was "188 to 235 months"); *Pryer v. United States*, 679 F. Supp. 2d 529, 353 (D. Del. 2010) ("movant's sentence (216 months) was well below the low end of the Sentencing Guidelines recommendation (262 months)"); *United States v. Gillam*, 753 F. Supp. 2d 683 (W.D. Mich. 2010) (sentencing the defendant to 18 months imprisonment where the applicable Guidelines range was 24 to 30 months).

215. See, e.g., *United States v. Keller*, 665 F.3d 711, 715–16 (6th Cir. 2011) (preserving the right to appeal if the sentence imposed exceeded the agreed-upon Sentencing Guidelines range); *United States v. Chavez-Marquez*, 407 Fed. App'x 346, 347 (10th Cir. 2011) ("Defendant agreed to a broad appeal waiver whereby he agreed to waive all appeals of his sentence within the guideline range."); *United States v. Autry*, 382 Fed. App'x 325, 326 (4th Cir. 2010) (reserving "only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing"); *United States v. Vazquez*, 406 Fed. App'x 430, 434 (11th Cir. 2010) (noting an exception to a plea waiver "for an upward departure or variance from the guideline range as calculated by the district court"); *United States v. Poindexter*, 342 Fed. App'x 871, 872 (4th Cir. 2009) ("Poindexter knowingly and voluntarily waived his right to appeal his sentence so long as it was a within-Guidelines sentence."); *United States v. Smith*, 500 F.3d 1206, 1209 (10th Cir. 2007) ("[T]he defendant waives the right to appeal the sentence imposed in this case except, to the extent, if any, the court departs upwards from the applicable sentencing guide-

In practice, *Freeman* only prohibits re-sentencing under Amendment 750 when the defendant has already received a lower sentence than was dictated by the pre-FSA Sentencing Guidelines.<sup>216</sup> *Freeman* allows defendants whose sentences were within the pre-FSA Sentencing Guidelines to seek re-sentencing under 18 U.S.C. § 3582(c)(2).<sup>217</sup>

Neither the formalist argument nor the plea agreement-based argument effectively preclude this Note's proposed interpretation of § 3582(c)(2). As a result, § 3582(c)(2) has the power to reach defendants who were sentenced according to the pre-FSA sentencing regime between the FSA's enactment and *Dorsey*.

## V. CONCLUSION

When the Supreme Court decided *Dorsey*, thousands of defendants sentenced in the two years after the FSA was enacted<sup>218</sup> must have calculated what the decision meant for them in months or years of freedom. Those defendants are entitled to the lower sentences dictated under the FSA just as much as crack cocaine offenders sentenced after *Dorsey*.<sup>219</sup> Yet they face an extraordinarily difficult battle to claim what the Supreme Court has told them is rightfully theirs.<sup>220</sup>

---

line range determined by the court."); *United States v. Hernandez Florez*, 155 Fed. App'x 745, 746 (5th Cir. 2005) ("Hernandez expressly waived the right to appeal his sentence but retained the right to appeal 'a sentence imposed above the statutory maximum' or 'an upward departure."); *United States v. Abreo*, 30 F.3d 29, 32 (5th Cir. 1994) ("As part of his plea agreement, Abreo waived his right to appeal his sentence on all grounds except if the sentence imposed was above the applicable guideline range"). *But see, e.g.*, *United States v. Herrera-Lopez*, 391 Fed. App'x 681, 682 (9th Cir. 2010) (dismissing an appeal based on departure from the Sentencing Guidelines because the defendant's appeal waiver did not preserve the issue for appeal and the court "provided notice that it could depart from the Sentencing Guidelines").

216. *Freeman*, 131 S. Ct at 2695–700 (2011) (Sotomayor, J., concurring).

217. *Id.*

218. U.S. SENTENCING COMM'N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT, Table 2 (2013) (stating that as of December, 2013, 12,551 defendants have sought re-sentencing (through various means) under the FSA. 5,055 of those defendants were denied re-sentencing (for various reasons)). The Sentencing Commission has not kept complete records of when each defendant was originally sentenced, with what statute he or she sought re-sentencing, and why it was denied. While the statistics are not perfect, they are enough to illustrate the gravity of the issue.

219. *Dorsey v. United States*, 132 S. Ct. 2321, 2332 (2012) (stating that the Fair Sentencing Act applies to *all* defendants sentenced after the FSA was enacted).

220. *Id.*

Defendants are consistently denied re-sentencing through direct appeals<sup>221</sup> and through ineffective assistance of counsel claims<sup>222</sup>—two of the most common methods by which FSA-eligible defendants seek re-sentencing. The third method by which FSA-eligible defendants seek re-sentencing, claims under § 3582(c)(2), is currently a subject of disagreement among the courts.<sup>223</sup> If courts deny re-sentencing under § 3582(c)(2), it will leave FSA-eligible defendants without a way to obtain the lower prison sentences to which they are entitled. This Note proposes an interpretation of § 3582(c)(2) and the FSA that preserves it as a way for FSA-eligible defendants to achieve re-sentencing.

The FSA should not be rendered powerless to reach two years' worth of defendants who were sentenced under a now-defunct, unjust sentencing regime. To allow that would contradict Congress' intent to "restore fairness to federal cocaine sentencing as soon as possible."<sup>224</sup> This Note urges the judiciary not to read § 3582(c)(2) so narrowly that "as soon as possible" is postponed until the last defendants sentenced before *Dorsey* have served their lengthy sentences.

---

221. See, e.g., *United States v. Harrison*, 699 F.3d 158, 159 (2d Cir. 2012).

222. See, e.g., *United States v. Bailey*, No. 10 Cr. 391(CM), 2013 WL 1828669, at \*3–4 (S.D.N.Y. Nov. 19, 2013).

223. Compare *United States v. Doe*, 731 F.3d 518, 526 (6th Cir. 2013) (re-sentencing defendant under § 3582(c)(2) because "applying the new minimums in Defendant's [Guidelines range] calculation is the only way to give effect to Congress' intent to achieve consistency with other Guidelines provisions"), with *United States v. Bell*, 731 F.3d 552, 555 (6th Cir. 2013) (denying re-sentencing because the FSA is a Congressional statute, not an amendment to the Sentencing Guidelines).

224. Letter from Sen. Richard Durbin and Sen. Patrick Leahy to Att'y Gen. Eric Holder (Apr. 29, 2009), available at <http://www.fd.org/docs/crack-cocaine/fair-sentencing-act-ag-holder-letter-111710-1-.pdf>.