No. 16-___

IN THE

Supreme Court of the United States

RAYMOND NEGRÓN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 3582(c)(2), a criminal defendant is eligible to receive a sentence reduction whenever the United States Sentencing Commission retroactively reduces the Sentencing Guidelines range for the defendant's crime, so long as the defendant's original sentence was "based on" that Guidelines range. In *Freeman v. United States*, 564 U.S. 522 (2011), this Court issued a fragmented, 4–1–4 set of opinions on the question whether a defendant is eligible for such a reduction after he enters into a binding plea agreement under Federal Rule of Civil Procedure 11(c)(1)(C). A four-Justice plurality held that, as long as the sentencing judge based his decision to accept the plea agreement on the relevant Guidelines, the defendant is eligible for a reduction. Justice Sotomayor, in a lone concurrence, held that a defendant should instead be eligible for a sentence reduction only if the parties made the Guidelines range clear on the face of the plea agreement.

The question presented is whether lower courts are bound by the rationale of Justice Sotomayor's concurrence—with which all other Justices in *Freeman* expressly disagreed—on the theory that it is the "narrowest grounds" under *Marks v. United States*, 430 U.S. 188 (1977).

PARTIES TO THE PROCEEDING

Petitioner, the Defendant-Appellant below, is Raymond Negrón.

Respondent, the Appellee below, is the United States of America.

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INTRODUCTION

Petitioner Raymond Negrón seeks review of a First Circuit decision that deepens a 10–2 split in the circuits on the question how to apply this Court's 4–1–4 decision in *Freeman v. United States*, 564 U.S. 522 (2011). To discern the meaning of *Freeman*, the courts of appeals have turned to *Marks v. United States*, 430 U.S. 188, 193 (1977), which instructs that when a fragmented Supreme Court decides a case and no single rationale enjoys the assent of five Justices, the holding of the Court is the position taken by those members "who concurred in the judgments on the narrowest grounds." In the forty years since *Marks* was decided, however, the courts of appeals have adopted divergent views regarding its proper application—a divergence responsible for engendering numerous circuit splits, as this case illustrates. The Court should take this opportunity to resolve an important split in the circuits, which will also clarify the meaning of the *Marks* rule.

OPINIONS BELOW

The opinion of the court of appeals is reported at 837 F.3d 91 and reproduced at Pet. App. 1a–9a. The unreported oral decision and judgment of the district court are produced at Pet. App. 10a–31a, 32a–33a.

JURISDICTION

The court of appeals entered its judgment on September 14, 2016. Pet. App. 2a. On November 30, 2016, Justice Breyer extended the time for filing this petition for certiorari to and including February 11, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of 18 U.S.C. § 3582(c)(2) is as follows:

> The court may not modify a term of imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

STATEMENT OF THE CASE

A. Legal Framework

The United States Sentencing Commission periodically reviews and amends the United States Sentencing Guidelines. 28 U.S.C. § 994(o). When the Commission promulgates an amendment that "reduces the term of imprisonment recommended" for a given offense or category of offenses, the Commission must "specify" whether and under what circumstances the amendment will be retroactive. 28 U.S.C. § 994(u). When the Commission makes an amendment retroactive, a previously-sentenced criminal defendant is eligible for a reduction of his sentence if it was "based on a sentencing range that

has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

In *Freeman v. United States*, 564 U.S. 522 (2011), this Court examined whether section 3582(c)(2) applies when a defendant signs a so-called "C-type" plea agreement. In a C-type plea agreement, the defendant and the Government agree to a recommended sentence that is binding on the sentencing court, should the court accept the agreement. Fed. R. Crim. P. 11(c)(1)(C) ("[S]uch a recommendation or request binds the court once the court accepts the plea agreement.").

The *Freeman* Court held that such plea agreements could provide the basis for relief under section 3582(c)(2), but the Court's opinions were fractured and no rationale obtained a majority. The four-Justice plurality determined that, "when a defendant enters into an 11(c)(1)(C) agreement, the judge's decision to accept the plea and impose the recommended sentence is likely to be based on the Guidelines; and when it is, the defendant should be eligible to seek § 3582(c)(2) relief." *Freeman*, 564 U.S. at 534 (plurality op.).

In a lone concurrence, Justice Sotomayor agreed that there was no categorical bar to relief but focused on the terms of the parties' plea agreement, rather than the sentencing judge's rationale: "if a [C-type] agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment," then "the defendant is eligible for sentence reduction under § 3582(c)(2)." *Id.* at 534 (Sotomayor, J., concurring).

The four-Justice dissent concluded that C-type plea agreements cannot form the basis for a sentence reduction under section 3582(c)(2): "After approving the agreement, the judge considers only the fixed term in the agreement, so the sentence he actually imposes is not 'based on' the Guidelines." *Id.* at 547 (Roberts, C.J., dissenting).

B. Factual Background and Procedural History

On August 22, 2012, a federal grand jury indicted Raymond Negrón on five counts of distributing controlled substances (oxycodone and cocaine), 21 U.S.C. § 841(a)(1), and four counts of firearm offenses. Pet. App. 2a–3a & n.1. Negrón consented to a plea agreement with the Government, conceding guilt on the drug-related counts and three of the four firearm counts. Pet. App. 3a. The Government agreed to dismiss the final firearm count. *Id.* The agreement—a "C-type" plea agreement—included a recommendation that Negrón be sentenced to 144 months in prison. *Id.*

In October 2013, the district court held a sentencing hearing and explained that it had "considered the sentencing range under the advisory guidelines, the policies underlying those guidelines, and all of the sentencing factors set forth in Section 3553(a)." Pet. App. 64a. The court then calculated Negrón's base offense level and criminal history category, which corresponded to a sentencing range of 57 to 71 months. Pet. App. 3a. The court explained that the recommended sentence of 144 months was "slightly over twice the high end of the advisory guideline." Pet. App. 65a. The court found this departure justified based on, *inter alia*, the

seriousness of the crimes and the Government's dismissal of a firearms charge that would have "carried a mandatory minimum 120-month consecutive imprisonment." *Id.* at 15–16. Accordingly, the district court accepted the agreement and imposed the 144-month sentence. Pet. App. 3a.

Following Negrón's sentencing, the Commission made substantial amendments to the Guidelines, retroactively reducing the applicable base level for various drug offenses, including those to which Negrón pled guilty (distribution of controlled substances). U.S.S.G. Supp. to App. C, Amend. 782 (2016). Under the revised Guidelines, the high end of Negrón's sentencing range would have been 57 months, as opposed to 71 months. Pet. App. 29a.

In 2015, Negrón moved for a sentence reduction under section 3582(c)(2). Pet. App. 3a–4a. The Government opposed the request on the grounds that "there is nothing within the plea agreement indicating that the 144 month stipulation was intended to be based on the guideline range." Pet. App. 83a. The Government argued that the First Circuit had already decided that Justice Sotomayor's concurrence in *Freeman,* 564 U.S. at 534, is binding on lower courts. Pet. App. 84a; *United States v. Rivera-Martinez*, 665 F.3d 344, 348 (1st Cir. 2011) ("Justice Sotomayor's concurrence delineates the narrowest grounds on which at least five Justices agree. It is, therefore, the controlling opinion." (citing *Marks*, 430 U.S. at 193 (citation omitted))). Based on Justice Sotomayor's concurrence, the Government argued that the "'four corners of the plea agreement'" must "identify with precision the

applicable guideline range by containing stipulations as to the total offense level and criminal history." Pet. App. 84a (quoting *Rivera-Martinez*, 665 F.3d at 349). Because Negrón's plea agreement did not explicitly identify the Guidelines range or its inputs, the Government argued that Negrón was ineligible for a sentence reduction.

The district court "reluctantly" agreed with the Government. It stated that Negrón "should get a reduction based on everything [the court is] aware of in this case." Pet. App. 29a. But it held nonetheless that *Rivera-Martinez* "really ties [the court's] hands." *Id.* If Negrón were "eligible for a reduction," the court reasoned, he would "be eligible in [the court's] view to a reduction to 116 months. That's twice the high end of the guideline plus two months, . . . the current sentence." *Id.* That is, because the district court had previously accepted Negrón's sentence as a reasonable doubling of his Guidelines range, Negrón deserved a reduced sentence that would, "proportion[ally]," be based on a doubling of the revised Guidelines range. *Id.* Although the court found it "unfortunate" that a "whole class of defendants" were being excluded under *Rivera-Martinez*, it denied Negrón's request and "invite[d] [him] to appeal." *Id.*

Negrón did appeal the denial of his request. Pet. App. 1a. On appeal, the First Circuit, too, held that *Rivera-Martinez* controlled. The First Circuit acknowledged that the Ninth and D.C. Circuits have explicitly disagreed with *Rivera-Martinez*, holding that Justice Sotomayor's concurrence is "not the narrowest opinion" in *Freeman*. Pet. App. 5a n.3. Nevertheless, the panel considered itself bound by

that earlier decision and applied the agreement-focused test in Justice Sotomayor's concurrence, asking whether Negrón's "plea agreement was based on a Guidelines sentencing range." Pet. App. 6a. Because Negrón's plea agreement did not explicitly contain his base offense level or criminal history category, the First Circuit affirmed the district court's denial of Negrón's request for a sentence reduction. Pet. App. 5a–6a, 9a.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN ENTRENCHED, 10–2 CIRCUIT SPLIT ON THE QUESTION WHETHER JUSTICE SOTOMAYOR'S CONCURRENCE IN *FREEMAN* IS BINDING ON THE FEDERAL COURTS.

The decision below further aggravates an existing 10–2 split among the courts of appeals on the question how to apply this Court's fragmented decision in *Freeman*, 564 U.S. 522. Every territorial federal court of appeals has weighed in on the question presented by this petition, and most have done so multiple times. Yet the circuits remain hopelessly divided on whether Justice Sotomayor's concurrence in *Freeman* is controlling under the rule that lower courts analyzing fragmented decisions must abide by the concurring opinion that relies upon the "narrowest grounds." *Marks*, 430 U.S. at 193.

1. In the wake of *Freeman*, a majority of the courts of appeals concluded that Justice Sotomayor's concurrence is controlling under *Marks*. The Fourth Circuit ruled first, erroneously holding that Justice Sotomayor's concurrence is the narrowest opinion that embodies a position implicitly approved by at

least five Justices. *United States v. Brown*, 653 F.3d 337, 340 n.1 (4th Cir. 2011). According to that court, every Justice who joined in the plurality opinion would agree that the defendant is eligible for a sentence reduction when the Rule 11(c)(1)(C) plea expressly uses a Guidelines sentencing range to establish the term of imprisonment. *Id.*

The First Circuit soon followed suit in *Rivera-Martinez*. 665 F.3d at 344. The First Circuit acknowledged that while five Justices concluded that entering into a C-type plea agreement is not a categorical bar to relief under section 3582(c)(2), "those five Justices reached this conclusion in different ways," and Justice Sotomayor's "approach differed sharply from the majority." *Id.* at 347. Nonetheless, the court held that, although the "gap between the plurality and the concurrence is wide, . . . it is still possible to tease out a common denominator." *Id.* at 348. According to the First Circuit, the *Freeman* plurality would "agree that in every case" where the parties laid out a Guidelines range in their agreement, "the sentencing judge's decision to accept that sentence is based on the guidelines." *Id.*

Eight additional circuits, displaying varying degrees of engagement with the issue, came to the same conclusion.[1] Some of these opinions explicitly

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[1] *See United States v. Benitez*, 822 F.3d 807, 811 (5th Cir. 2016) (per curiam); *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013); *United States v. Thompson*, 682 F.3d 285, 289 (3d Cir. 2012); *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012); *United States v. Lawson*, 686 F.3d 1317, 1321 n.2

rely on the First Circuit's erroneous conclusion that the *Freeman* concurrence is a subset of the plurality opinion's reasoning. *See, e.g.*, *United States v. Thompson*, 682 F.3d 285, 289 (3d Cir. 2012). Some opinions are simply conclusory in their holdings. *See, e.g.*, *United States v. Benitez*, 822 F.3d 807, 811 (5th Cir. 2016) (per curiam) ("Today, we explicitly adopt Justice Sotomayor's concurring opinion in *Freeman*."); *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012) (holding that Justice Sotomayor's concurrence was the "most case-specific basis for deciding *Freeman*"). Indeed, even the Ninth Circuit, which would later reverse itself *en banc*, initially decided without discussion that "Justice Sotomayor's concurrence is the controlling opinion because it reached [its] conclusion on the narrowest grounds." *United States v. Austin*, 676 F.3d 924, 927 (9th Cir. 2012) (citation omitted) *overruled by United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (*en banc*).

2. The first court to undertake a deep analysis of *Freeman* was the D.C. Circuit in *United States v. Epps*, 707 F.3d 337 (D.C. Cir. 2013), which rejected the majority view. The D.C. Circuit explained that under *Marks*, the "narrowest opinion must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment." *Id.* at 348 (citations omitted). "[T]here is no controlling opinion in *Freeman* because the plurality and

(continued…)

(11th Cir. 2012) (per curiam); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011); *United States v. Howell*, 541 F. App'x 13, 14 (2d Cir. 2013).

concurring opinions do not share common reasoning whereby one analysis is a 'logical subset' of the other." *Id.* at 350 (citation omitted). As the D.C. Circuit explained, under the *Freeman* concurrence, "courts should examine the intent of the *parties* . . . to determine whether a sentence pursuant" to a plea agreement is "based on" the Guidelines. *Id.* (emphasis added). But the plurality opinion "rejects the concurring opinion's approach, stating its rationale is fundamentally incorrect because § 3582(c)(2) 'calls for an inquiry into the reasons for a *judge's* sentence, not the reasons that motivated or informed the parties.'" *Id.* at 350 (quoting *Freeman*, 564 U.S. at 533) (emphasis added). Because "the set of cases where the defendant prevails under the concurrence is not always nestled within the set of cases where the defendant prevails under the plurality," it cannot be the controlling opinion. *Id.* at 351.

Persuaded by the reasoning in *Epps*, the *en banc* Ninth Circuit last year overruled its prior panel opinion 10–1 and adopted the D.C. Circuit's approach. *Davis*, 825 F.3d 1014. The Ninth Circuit explicitly rejected the "First Circuit's assertion" that Justice Sotomayor's concurrence was a lowest common denominator because "there are some circumstances where defendants would be eligible for relief under Justice Sotomayor's approach but not under the plurality's." *Id.* at 1024. The Ninth Circuit held that it was not bound by Justice Sotomayor's opinion and, with no controlling opinion in *Freeman*, the Ninth Circuit was "restricted only by the ultimate result in *Freeman*: that defendants sentenced under Rule 11(c)(1)(C) agreements are not

categorically barred from seeking a sentence reduction under § 3582(c)(2)." *Id.* at 1026.[2]

As a result of the D.C. Circuit's decision and the Ninth Circuit's *en banc* reversal of course, there is an intractable 10–2 split on the question presented. Both the D.C. Circuit and the Ninth Circuit explicitly acknowledged that they were breaking with other courts. *Epps*, 707 F.3d at 350 (noting contrary holdings of other courts of appeals); *Davis*, 825 F.3d at 1022 ("[W]e do not find those opinions convincing."). And the circuits holding the majority position, including the First Circuit below, have acknowledged the conflict yet refused to revisit their position. Pet. App. 5a n.3; *see also, e.g.*, *United States v. Anderson*, 658 F. App'x 753, 755 n.1 (6th Cir. 2016); *United States v. Grayson*, 587 F. App'x 501, 501 (10th Cir. 2014). This is thus not a case where "further consideration of the substantive and procedural ramifications of the problem by other courts will enable [this Court] to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., opinion respecting the denial of certiorari). There is an entrenched, 10–2 circuit split on the question presented. Without intervention by this Court, the confusion will continue unabated.

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[2] In the absence of binding authority, the Ninth Circuit "join[ed] the D.C. Circuit and adopt[ed] the [*Freeman*] plurality's [persuasive] rule." *Id.* at 1026.

II. THE QUESTION PRESENTED IS IMPORTANT AND MERITS THE COURT'S ATTENTION FOR MULTIPLE REASONS.

The question whether Justice Sotomayor's *Freeman* concurrence is controlling affects a large number of inmates both present and future. Further, by clarifying the correct approach to analyzing *Freeman*, this Court can resolve not only an important area of sentencing law; it can also clarify a forty-year old interpretive principle that has "baffled and divided lower courts" again and again. *Nichols v. United States*, 511 U.S. 738, 746 (1994).

A. Whether Justice Sotomayor's *Freeman* Concurrence Is Controlling Is an Important, Recurring Issue of Federal Sentencing Law.

The undisputed purpose of the Guidelines is to "reduce unwarranted disparities in federal sentencing." *Freeman*, 564 U.S. at 525. Without this Court's intervention, that purpose will be flaunted in an immense number of cases.

1. When the Sentencing Commission amended the Guidelines bearing on this case, it noted that the "number of cases potentially involved is large, and the magnitude of the change in the [G]uideline range is significant." U.S.S.G. Supp. to App. C, Amend. 788 reason for amend. (Nov. 1, 2016). The Commission estimated that "46,000 offenders may benefit from retroactive application of Amendment 782," and "the average sentence reduction would be approximately 18 percent." *Id.* More generally, 97% of sentencing decisions arise in the context of a guilty plea. U.S.S.C., 2015 Sourcebook of Federal

Sentencing Statistics at Figure C. To be sure, not all defendants who plead guilty sign C-type agreements, but even a portion of a very large number remains a large number. And an average sentence reduction of almost twenty percent is a substantial effect that will cut down prison time by years apiece.

2. Further, the significance of this case reaches well beyond the amendment that happens to be at issue for Negrón. The Commission regularly reviews the Guidelines and often makes amendments retroactive. A current listing provides thirty separate amendments that the Commission made retroactive, any one of which can be pages long and have wide effect. *See* U.S.S.G. § 1B1.10(d) ("Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1))."). Indeed, *Freeman* itself analyzed a different amendment than the one at issue here. *See Freeman*, 564 U.S. at 528 (plurality op.) (discussing amendment 706, which remedies disparity between penalties for cocaine base and powder cocaine offenses). Moreover, the Commission continues to amend the Guidelines and seek input on which amendments to apply retroactively. *See, e.g.*, U.S.S.C., Proposed Amendments to the Sentencing Guidelines at ii (Dec. 19, 2016) (requesting "public comment" regarding whether "any proposed amendment published in this document should . . . be applied retroactively to previously sentenced defendants"). Simply put, a decision on this issue will have expansive effect.

The far-reaching nature of this issue is confirmed by the unusually large number of appellate decisions rendered in a short period of time. Although *Freeman* was decided just over six years ago, *every* territorial circuit has issued decisions on the question, most of them multiple times. *See supra* n.1; *see also, e.g.*, *United States v. Banks*, 770 F.3d 346, 351 (5th Cir. 2014) (per curiam); *Austin*, 676 F.3d at 924; *United States v. Duvall*, 705 F.3d 479, 483 (D.C. Cir. 2013); *United States v. Ware*, 694 F.3d 527, 533 (3d Cir. 2012); *United States v. Mitchell*, 500 F. App'x 802, 805 (11th Cir. 2012) (per curiam); *United States v. Cover*, 491 F. App'x 87, 89 (11th Cir. 2012) (per curiam). This partial list does not include the numerous district court decisions that never reached appellate review.

3. The need to resolve this conflict is particularly pressing because this split of authorities "permit[s] the very disparities the Sentencing Reform Act seeks to eliminate." *Freeman*, 564 U.S. at 533. "[U]niformity" is a "basic Federal Sentencing Guidelines objective[.]" *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012). When a defendant in Arizona receives a different sentence than an identical defendant in Maine, and that outcome is required by the conflicting precedents of the regional circuits, the Guidelines have failed before they are even applied. "[A]ppellate review" is meant to "promote uniformity by tending to iron out sentencing differences." *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013). Unless this Court grants review, appellate review will not "iron out" sentencing differences—it will require them.

4. In opposing a recent petition that raised a similar question, the Government erroneously argued that "because plea agreements can . . . be drafted to avoid any controversies about whether the sentence set forth in such an agreement is 'based upon' the Guidelines," the issue was of limited importance. Brief in Opposition at 18, *McNeese v. United States*, 137 S. Ct. 474 (2016) (No. 16-66) 2016 WL 6082343. But this argument misses the mark. The reason for the circuit split is that *some* circuits rely solely on the plea agreement but others *do not*. Even if the Government could guarantee the uniformity of plea agreements—a doubtful proposition—that uniformity would only matter in the circuits that apply the wrong rule. In the D.C. and Ninth Circuits, the plea agreement will not be dispositive. Uniformity among plea agreements would, at best, replace one type of conflict with another. Accordingly, there is no reason to expect that the Government can somehow obviate the need for review through clever drafting.

B. This Case Is Also Worthy of Review Because Clarifying the Proper Analysis of *Freeman* Can Help Resolve Substantial Confusion in the Circuits Concerning the Binding Effect of Fragmented Supreme Court Decisions.

In the forty years since *Marks* was decided, it has been "more easily stated than applied." *Nichols*, 511 U.S. at 745. Resolving whether Justice Sotomayor's concurrence is the controlling opinion in *Freeman* would not only provide much-needed clarity to a substantive area of sentencing law, it would provide

much-needed guidance on the correct procedure for analyzing a fragmented opinion of this Court.

1. The extensive split over *Freeman* is sitting atop extensive disagreements among—and even within—the circuits regarding the correct process for identifying controlling opinions from fragmented Supreme Court decisions. A majority of courts purport to use a "logical subset" or "lowest common denominator" test, and they look to the common *reasoning* that a majority applied. But that is not the only approach. *Davis*, 825 F.3d at 1020–22.

For instance, the Third Circuit uses a "results" approach, where the court decides the outcome in a given case based on the *result* that a majority of Justices in the controlling case would have accepted, regardless of their reasoning. *Id.*; *see Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694–97 (3d Cir. 1991) (finding that Justice O'Connor's concurring opinions controlled fractured decisions because a majority of Justices in each case would have agreed with the result under her concurrences), *aff'd in part*, *rev'd in part*, 505 U.S. 833 (1992). Judge Kavanaugh of the D.C. Circuit has endorsed this "results" view (albeit while acknowledging that the D.C. Circuit does not apply it): where there is no lowest common denominator, the proper analysis is "for the lower court to run the facts and circumstances of the current case through the tests articulated in the Justices' various opinions in the binding case and adopt the result that a majority of the Supreme Court would have reached." *United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (denying *en banc* review). The First Circuit, too, has applied this results-

oriented test where there are no identifiable "narrowest grounds" under the logical subset test. *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) ("Following Justice Stevens's [dissenting] instruction ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding.").

There is yet further disagreement on whether dissents can be considered in the analysis of a fractured decision. Several courts have held that dissents cannot be considered because "[d]issenters, by definition, have not joined the Court's decision." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007); *see also King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (*en banc*) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."). Other courts are willing to look to dissents. *Johnson*, 467 F.3d at 65 (1st Cir.); *see also United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) ("[W]e have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue.").

In such disarray are the lower courts that multiple circuits have applied conflicting tests within their own circuit. *See, e.g.*, *Davis*, 825 F.3d at 1021 (noting that the Ninth Circuit has, in the past, used "results"-based language, but explicitly adopting "logical subset" test); *compare Casey*, 947 F.2d at 694–97 (applying "results" test) *with Thompson*, 682 F.3d at 289 (relying on "logical subset" approach); *see also Duvall*, 740 F.3d at 613 (Kavanaugh, J., concurring) (arguing that, contrary to the D.C. Circuit's decision in *Epps*, "*Marks* does not require

the multiple opinions supporting the Supreme Court's judgment to employ a 'common rationale'").[3]

2. Without guidance from this Court on the proper application of *Marks*, the circuit courts' variety of approaches has predictably resulted in numerous circuit splits, many of which are still outstanding. For example, the Court's fragmented decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which splintered 4–1–4, has produced varied responses from circuit courts. In that case, the Court held unconstitutional as-applied a portion of the Coal Industry Retiree Health Benefit Act of 1992, which imposed an obligation to pay health benefits to retired miners on a party that had exited the mining business decades prior. Four Justices relied on the Takings Clause of the Fifth Amendment. *Id.* at 538. Justice Kennedy concurred in the outcome, but rejected the plurality's rationale and relied instead on the Due Process Clause. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part). Due to their confusion over the *Marks* rule, lower courts have come to contrary conclusions on how to apply that decision. *Compare Franklin Cty.*

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[3] Even while ruling 10–1 that the *Freeman* concurrence was not controlling, the *en banc* Ninth Circuit could not agree on whether it is proper to analyze dissenting opinions. A five-judge concurrence explained that "*Marks* leaves some questions unanswered, but it plainly limits our review to the opinions of 'those Members [of the Court] *who concurred in the judgments*.'" *Davis*, 825 F.3d at 1029 (Christen, J, concurring) (quoting *Marks*, 430 U.S. at 193). But six other judges (five in the majority, one in dissent) suggested that the court "might be free to take dissenting opinions into account." *Id.* (Christen, J., concurring).

Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 552 (6th Cir. 2001) (finding no controlling opinion in *Eastern Enterprises*) *and United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (same) *with Parella v. Ret. Bd. of Rhode Island Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (combining plurality and dissent to find that *Eastern Enterprises* controlled the question whether the Takings Clause applied).

Likewise, the question whether to analyze dissenting opinions has resulted in a split over the application of *Rapanos v. United States*, 547 U.S. 715 (2006), in which the plurality and a separate concurrence adopted inconsistent criteria for determining the existence of "navigable waters." *Compare Johnson*, 467 F.3d at 66 (First Circuit holding that the Government can establish "navigable waters" if it satisfies *either* the plurality *or* the concurrence's tests); *with Robison*, 505 F.3d at 1221 (Eleventh Circuit accepting only the concurrence's test because it was the least "far reaching" among the decisions that supported judgment).

In other cases, this Court has had to resolve an issue twice because lower courts split in their understanding of the Court's original, fractured decision. For instance, in *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992), this Court examined a "question [] essentially identical to the one [the Court] addressed" previously in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711 (1987) (*Delaware Valley II*) (4–1–4 fragmented opinions). In *Nichols*, 511 U.S. at 745–46, this Court recognized that confusion arising

from the fragmented decision in *Baldasar v. Illinois*, 446 U.S. 222 (1980), required it to "reexamine[e] that decision." *See also Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (recognizing that courts of appeals split over the question of which opinion, if any, controlled *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), requiring the Court to address the same question again).

By resolving the substantial circuit conflict that exists with regard to the binding effect of Justice Sotomayor's concurrence in *Freeman*, the Court can not only clarify the proper handling of a great many sentence modification cases under 18 U.S.C. § 3582(c)(2), it will also clarify a broader confusion in the lower courts about the binding effect of fragmented Supreme Court decisions.

III. THIS PETITION PRESENTS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This petition presents a clean vehicle to decide the question presented. The question is squarely before the Court, and there are no lingering jurisdictional or remedial issues that could undercut the Court's decisionmaking. Indeed, the district court and First Circuit went out of their way to clarify that their decisions were based on binding, contrary precedent. Moreover, the resolution of this question will also do much to inform future lower court analyses of fragmented decisions.

1. There can be no dispute that the First Circuit ruled against Negrón on the sole basis that it was bound to apply Justice Sotomayor's *Freeman* concurrence. The First Circuit stated as much, even

while acknowledging the First Circuit's divergence from two other courts of appeals. Pet. App 5a n.3.

There can also be no dispute that, in the absence of the First Circuit's interpretation of *Freeman*, the district court would have granted Negrón a sentence reduction. The district court explicitly laid out what it *would* do, if not bound by the First Circuit's contrary precedent, stating that Negrón "should get a reduction based on everything I'm aware of in this case, but I think *Rivera-Martinez* really ties my hands." Pet. App. 29a. If Negrón were "eligible for a reduction," he would "be eligible in my view to a reduction to 116 months. That's twice the high end of the guideline plus two months, . . . the current sentence." *Id*.

And there is no credible dispute that, under the reasoning of the plurality in *Freeman*, Negrón is eligible for a sentence reduction. In *Freeman*, the district court "first calculated the sentencing range." *Freeman*, 564 U.S. at 530. The district court also "explained that it considered the advisory guidelines and 18 U.S.C. [§] 3553(a)." *Id.* (quotation marks omitted). The district court then explained that the "sentence imposed falls within the guideline range." *Id.* The district court here followed virtually identical procedures, the only difference being that it justified a departure (doubling the Guidelines range), rather than accepting that the sentence was within the Guidelines range. But that difference is immaterial, as the *Freeman* plurality specifically noted that, "where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real

sense a basis for the sentence." *Id.* at 529 (internal citation omitted). As the district court explained, "from [its] perspective the sentence was based in significant part on those guidelines. They were the foundation from which [the district court] started [its] thought process about what was an appropriate sentence." Pet. App. 16a.[4]

2. Further, this case squarely raises the question of the appropriate method to determine controlling precedent in fragmented Supreme Court decisions. The method used to analyze this question will control the outcome of the case. If the "logical subset" test is the correct test, neither the plurality nor the concurrence is controlling, as neither is a logical subset of the other, and the First Circuit should be reversed. If the "results" test is the correct test—and courts can consider dissenting opinions—then the First Circuit was correct to deny relief, as the

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[4] Moreover, unlike the recent petition in *McNeese*, 137 S. Ct. 474, there is no issue regarding Negrón's eligibility for a sentence reduction. In *McNeese*, a reversal would have been pointless, as the petitioner was *already* sentenced to a term that was "less than the minimum of the amended guideline range," and thus was ineligible for a sentence reduction. U.S.S.G. § 1B1.10(b)(2)(A); *see generally* Brief in Opposition, *McNeese*, 137 S. Ct. 474 (No. 16-66) 2016 WL 6082343; U.S.S.G. § 1B1.10(b)(2)(A) (providing that a district court "shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) to a term that is less than the minimum of the amended guideline range"). Conversely, Negrón's amended sentencing range here is well-below his current sentence, leaving ample room for the district court to grant a downward reduction to 116 months, as the district court already said it would do.

concurrence and dissent in *Freeman* would have done.

IV. THE FIRST CIRCUIT DECISION IS WRONG AND SHOULD BE REVERSED.

The decision below is wrong. An opinion from a fragmented decision is controlling only to the extent that it puts forth the "narrowest grounds" for the judgment. *Marks*, 430 U.S. at 193. As long as there are some factual scenarios where one opinion would grant relief but not the other—and vice versa—neither can be said to be "narrowest," because, depending on the facts, either might be more likely to grant (or deny) relief. In that situation, the decision controls only to the extent of agreement between the plurality and concurring opinions.

Alternative approaches outside of the "logical subset" test should be rejected. These misguided alternative tests would treat as binding authority a rationale that has been rejected by a majority of this Court. This result is contrary to the traditional understanding of precedent. *See, e.g.*, Eugene Wambaugh, The Study of Cases §48, at 50 & n.1 (2d ed. 1894) ("If . . . less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.").

Moreover, these alternative approaches rely on predicting the outcome this Court *would* have reached, by "run[ning] the facts and circumstances of the current case through the tests articulated in the Justices' various opinions in the binding case." *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring). But a rule that predicts how this Court *would* decide a case is no more appropriate than predicting that

the Court *would* overturn its own precedent. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). It is not only the Court's prerogative to overturn its own cases, it is also the Court's prerogative to lay down binding rules; when the Court has not done so, courts of appeals should not act as if it has.

Paradoxically, alternative approaches also grant binding authority to *dissents*. The results-based approach, for instance, would grant power to Justice Sotomayor's concurrence but also the *Freeman* dissent, merging those two opinions to form a hypothetical "majority" of the Court. Granting authoritative effect to dissents is contrary to the express holding of *Marks*, which "plainly limits our review to the opinions of 'those Members of the Court *who concurred in the judgments*.'" *Davis*, 825 F.3d at 1029 (Christen, J., concurring). Further, taking dissenting opinions into account would be an extraordinary departure from the ordinary understanding that dissents, however persuasive, "have not joined the Court's decision." *Robison*, 505 F.3d at 1221; *see also* Michael L. Eber, *When the Dissent Creates the Law*, 58 EMORY L.J. 207, 217 (2008) (noting that under traditional command model of precedent, a legal principle must receive endorsement by a majority of Justices *and* form a necessary connection with the judgment of a majority of Justices to be binding).

The proper test is the logical subset test, and the First Circuit failed to apply that test correctly, if it even did so at all. In *Rivera-Martinez*, the First Circuit decided that Justice Sotomayor's concurrence was subsumed by the plurality opinion. But the First Circuit failed to grapple with the examples that proved this conclusion wrong.

The opinions of the D.C. and Ninth Circuits explained in detail the error of the First Circuit. For instance, the Ninth Circuit explained that "Justice Sotomayor focused on the role the *parties'* Guidelines calculations play . . . . By contrast, the plurality focuses on the role of the *judge's* Guidelines calculations in deciding whether to accept or reject the agreement." *Davis*, 825 F.3d at 1022. Because the majority and concurring opinions lack a common rationale, it is unsurprising that "[c]ases producing an outcome in favor of the defendant under Justice Sotomayor's opinion would *not* invariably yield an outcome in his favor under the plurality." *Duvall*, 740 F.3d at 619 (Williams, J, concurring). There are factual scenarios where a defendant would be eligible for a sentence reduction under the plurality opinion but not the concurrence, *and* vice versa.

The instant petition is an example of the former: Negrón would receive a reduction of almost two-and-a-half years if the First Circuit applied the *Freeman* plurality's reasoning.

An example of the latter would be a situation where the *parties* explicitly agreed on a particular sentencing range, but the *court* disagreed with the parties' assessment. *Davis*, 825 F.3d at 1023. If the court then accepted the plea agreement anyway, the defendant would be eligible for a later reduction

under Justice Sotomayor's concurrence, because the parties explicitly based their sentencing recommendation on the Guidelines. *Id.* But under the plurality's method, the defendant would *not* be eligible for a later reduction because the court disregarded that Guidelines range. *Id.* Because both scenarios exist, neither opinion can be said to be "narrow[er]" than the other. *Id.* at 1023–24.

The First Circuit, by giving binding effect to a sole concurrence, has "turn[ed] a single opinion that lacks majority support into national law." *Palmer*, 950 F.2d at 782. "When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force." *Id.* Yet that is what the First Circuit has done here. *See Freeman*, 564 U.S. at 532–33 (plurality op.) (rejecting Justice Sotomayor's reliance on the terms of the plea agreement because the "statute . . . calls for an inquiry into the reasons for a judge's sentence, not the reasons that motivated or informed the parties"); *id.* at 544 (Roberts, C.J., dissenting) ("I agree with the plurality that the approach of the concurrence to determining when a Rule 11(c)(1)(C) sentence may be reduced is arbitrary and unworkable.").

Because there is no controlling opinion in *Freeman* beyond the basic rule that section 3582(c)(2) relief is available to at least some defendants who have signed binding plea agreements, the First Circuit erred in believing itself bound by Justice Sotomayor's concurrence. The First Circuit should have relied on the plurality and concurrence in *Freeman* as persuasive authority only, just as the D.C. and Ninth Circuits did.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 10, 2017

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 15-1898

UNITED STATES OF AMERICA,

Appellee,

v.

RAYMOND NEGRÓN,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Joseph A. DiClerico, U.S. District Judge]

Before

Torruella, Lynch, and Barron,
Circuit Judges.

Bruce E. Kenna, on brief for appellant.

Seth R. Aframe, Assistant United States Attorney, and Emily Gray Rice, United States Attorney, on brief for appellee.

September 14, 2016

TORRUELLA, Circuit Judge. Defendant-Appellant Raymond Negrón appeals the United States District Court for the District of New Hampshire's decision to deny a retroactive reduction to his sentence pursuant to 18 U.S.C. § 3582(c)(2). Negrón had previously entered into plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which "bind[s] the district court to a pre-agreed sentence if the court accepts the plea." *United States* v. *Rivera-Martínez*, 665 F.3d 344, 345 (1st Cir. 2011). Under so-called C-type plea agreements, a defendant is eligible for a sentence reduction based on a retroactive amendment to the United States Sentencing Guidelines ("Guidelines") only if the term of imprisonment specified in the agreement is "based on" a Guidelines sentencing range. We agree with the district court that the proposed sentenced in Negrón's plea agreement failed to meet this requirement and affirm.

I.

On August 22, 2012, a federal grand jury returned a nine-count indictment against Negrón.[1] Negrón

[1] Counts one through five charged Negrón with controlled substance offenses in violation of 21 U.S.C. § 841(a)(1). Count six charged Negrón with sale of a firearm to a prohibited person in violation of 18 U.S.C. § 922(d). Counts seven through nine related to Negrón's possession of a Mossberg twenty gauge bolt action shotgun. Negrón was charged with possession of an unregistered firearm, 26 U.S.C. §§ 5861(d), 5841, 5871; possession of a firearm with an obliterated serial number, 18

and the Government subsequently reached a plea agreement in which Negrón pled guilty to counts one through eight. The Government dismissed count nine, which carried a mandatory minimum consecutive sentence of 120 months' imprisonment. *See* 18 U.S.C. § 924(c)(1)(B)(i). Negrón's plea agreement was made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Under so-called C-type plea agreements, "the parties bind the district court to a pre-agreed sentence if the court accepts the plea." *Rivera-Martínez*, 665 F.3d at 345. Although the plea agreement did not state a base level offense, applicable Guidelines range, or criminal history category ("CHC"), the parties stipulated that Negrón would be sentenced to 144 months' imprisonment.

The district court conducted a sentencing hearing on June 13, 2013, and determined that Negrón had a total base offense level of 25 and CHC of I, corresponding to a Guidelines range sentence of 57 to 71 months' imprisonment. Noting that the stipulated sentence was "slightly over twice the high end of the advisory guideline," the district court accepted the plea agreement and imposed the stipulated sentence.

In 2014, the United States Sentencing Commission retroactively reduced the base offense level for many drug offenses by two levels. *See* U.S.S.G. § 1B1.10(a)(1); U.S.S.G. supplement to app. C amend. 782 (Nov. 1, 2014); *United States* v. *Vaughn*, 806 F.3d

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(continued…)

U.S.C. § 922(k); and possession of a short-barreled shotgun during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1)(B)(i).

640, 643 (1st Cir. 2015). Because several of his convictions were for controlled substance offenses, Negrón subsequently filed a motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2). The district court denied Negrón's motion, concluding that Negrón's sentence was not based on a Guidelines sentencing range affected by an amendment. This timely appeal followed.

II.

A district court performs a "two-step inquiry" in determining whether a defendant is entitled to a sentence reduction under § 3582(c)(2). *Dillon* v. *United States*, 560 U.S. 817, 826 (2010). First, the district court must determine whether any applicable Guidelines amendments apply to the defendant's sentence. *Id.* at 826-27. Second, if the district court concludes the defendant is eligible for relief, it must weigh the sentencing factors described in 18 U.S.C. § 3553(a) and determine whether a reduction is warranted. *Id.* Here, the sole issue on appeal is whether the district court properly applied our decision in *Rivera-Martínez*, 665 F.3d at 344, to conclude that Negrón was ineligible for relief.[2] Although "[w]e review a district court's denial of a motion for reduction of sentence under section 3582(c)(2) for abuse of discretion," *United States* v. *Caraballo*, 552 F.3d 6, 8 (1st Cir. 2008), because Negrón contends the district court committed legal error, our review is effectively *de novo*, *id.* ("A

[2] The district court stated that, if Negrón were legally eligible, it would have reduced his sentence to 116 months' imprisonment.

material error of law is perforce an abuse of discretion.").

Courts may reduce the term of imprisonment for "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." 18 U.S.C. § 3582(c)(2). The term of imprisonment in a C-type plea agreement is "based on" a Guidelines sentencing range in two scenarios: (1) when the agreement "calls for a sentence within an identified sentencing range," *Rivera-Martínez*, 665 F.3d at 348, and (2) when "the terms contained within the four corners of the plea agreement," *id.* at 349, "make clear that the basis for a specified term of imprisonment is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty," *id.* at 348 (alterations omitted) (quoting *Freeman* v. *United States*, 564 U.S. 522, 539 (2011) (Sotomayor, J., concurring)).[3]

Negrón acknowledges his term of imprisonment is not within a specific Guidelines sentencing range, but argues that his plea agreement fell into this second category. As in *Rivera-Martínez*, however, Negrón's plea agreement lacks the "two essential coordinates" that show a Guidelines sentencing range underpins the proposed sentence. *Id.* at 349. In that case, we

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[3] We acknowledge that since we decided *Rivera-Martínez*, two other circuits have concluded that Justice Sotomayor's concurrence is not the narrowest opinion in *Freeman* v. *United States* and thus nonbinding. *See United States* v. *Davis*, F.3d __, 2016 WL 324504316 (9th Cir. June 13, 2016) (en banc); *United States* v. *Epps*, 707 F.3d 337 (D.C. Cir. 2013). Nonetheless, we view *Rivera-Martínez* as controlling Negrón's appeal.

found that a C-type plea agreement that failed to specify a CHC (despite specifying a base offense level) could not be considered to be based on a Guidelines sentencing range. *Id.* Negrón's case is even weaker because his plea agreement contains neither a base offense level nor a CHC. Absent either of these two essential coordinates, we cannot conclude Negrón's plea agreement was based on a Guidelines sentencing range. *Id.*

Nonetheless, Negrón contends that we can infer both numbers from the four corners of his plea agreement. With respect to the base offense level, Negrón argues his plea agreement contains all of the facts necessary to calculate this integer. With respect to his CHC, Negrón claims this number was never seriously contested, due to his relatively sparse criminal record, and is obvious from his presentence report. Finally, Negrón cites the fact that at his sentencing hearing the district court acknowledged that 144 months' imprisonment was equal to doubling the high end of the applicable Guidelines range and "rounding [up to] an even twelve-year sentence." Negrón views this statement as evidence that his plea agreement was based on a Guidelines sentencing range.

Negrón's arguments run contrary to our holding in *Rivera-Martínez*. Under the Guidelines, a district court may accept a C-type plea agreement only if the agreement stipulates a sentence that is within the applicable Guidelines range or the district court is satisfied that the sentence departs from the Guidelines range "for justifiable reasons." U.S.S.G. § 6B1.2(c). In other words, even with C-type plea agreements, the district court must calculate the

defendant's base offense level and CHC to determine whether the sentence negotiated by the parties is acceptable. Because we have rejected the view that all C-type plea agreements may qualify for relief under § 3582(c)(2), we have held that the fact that the district court "perform[ed] [Guidelines calculations] before deciding whether to accept the agreement" is insufficient to show that the stipulated sentence is based on a Guidelines sentencing range. *Rivera-Martínez*, 665 F.3d at 349.

The inclusion of admitted facts in Negrón's plea agreement does not necessarily demonstrate that that parties intended to base his sentence on a particular base offense level. Rather, these facts merely helped the district court perform the Guidelines analysis necessary to its review of the agreement. Moreover, a sentencing court need not rely exclusively on the facts listed in a plea agreement when performing its Guidelines calculation to determine whether to accept the plea. The district court and Negrón both relied on his presentence report -- a document outside of the four corners of the plea agreement -- to calculate his CHC. We therefore reject Negrón's contention that we can infer that he and the Government had a specific base offense level in mind from the stipulated facts in his plea agreement.

We also decline Negrón's invitation to find that his plea agreement implicitly referenced his CHC. Although the "obviousness" of this integer may be an explanation for its absence from the plea agreement, it is not the only one. The absence of the CHC is equally consistent with the parties simply viewing

other factors besides Negrón's Guidelines range as important to determining his sentence.

For similar reasons, we are equally unpersuaded by Negrón's argument that his plea agreement must have been based on a Guidelines sentencing range because his stipulated sentence is roughly double the high end of the Guidelines sentencing range. We have recognized that the "term of imprisonment in a C-type plea agreement will most often be negotiated by reference to the relevant guideline provisions" and interpreted § 3582(c)(2) as requiring a stronger "linkage." *Id.* (citing *Freeman*, 564 U.S. at 537). Negrón's observation falls short. Although the district court acknowledged some relationship between the stipulated sentence and the applicable Guidelines range, the district court also factored into its analysis the fact that the Government had agreed to dismiss count nine of Negrón's indictment, which carried a mandatory minimum consecutive sentence of 120 months' imprisonment. In other words, non-Guidelines factors also explained Negrón's proposed sentence. Understanding the role the Guidelines played vis-á-vis the dropped charge would require us to "to supplement the [a]greement with . . . the parties' background negotiations," something *Rivera-Martínez* forbids. *Id.* We therefore decline to accept Negrón's invitation to infer a Guidelines basis for his stipulated sentence.

Finally, Negrón claims his stipulated sentence was based on a Guidelines sentencing range because his plea agreement contains various references to the Guidelines including that (1) the district court was required to consider the Guidelines in an advisory capacity; (2) Negrón was aware that the Guidelines

were nonbinding; (3) the United States and the United States Probation Office would advise the court of any inaccuracies in the presentence report; and (4) the Government would not "oppose an appropriate reduction in [Negrón's] adjusted offense level, under the advisory Sentencing Guidelines, based upon [Negrón's] prompt recognition and affirmative acceptance of personal responsibility for the offense." These generic plea agreement statements are insufficient to show that Negrón's term of imprisonment was based on a Guidelines sentencing range because it is not "evident from the agreement itself" that the "basis for the specified term [of imprisonment] is a Guidelines sentencing range." *Freeman*, 564 U.S. at 539 (Sotomayor, J., concurring). They simply show that the Guidelines would play some amorphous role in the parties' negotiations and the district court's analysis of the plea. This falls short of the linkage *Rivera-Martínez* requires.

III.

Because we cannot conclude that Negrón's sentence was based on a Guidelines sentencing range, we agree with the district court that he is not eligible for a sentencing reduction pursuant to § 3582(c)(2).

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* *

UNITED STATES OF AMERICA	*	
	*	12-cr-110-01-JD
v.	*	
	*	July 22, 2015
RAYMOND NEGRON	*	11:15 a.m.

* *

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE
JOSEPH A. DiCLERICO JR.

Appearances:

For the Government:	Seth R. Aframe, AUSA U.S. Attorney's Office 53 Pleasant Street Concord, NH 03301
For the Defendant:	Bruce E. Kenna, Esq. Kenna, Johnston & Sharkey, P.A. 69 Bay Street Manchester, NH 03104
Probation Officer:	Jodi Gauvin

Court Reporter: Sandra L. Bailey, LCR, CM, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

BEFORE THE COURT

THE CLERK: The Court has before it for consideration this morning oral argument in criminal case 12-110-01-JD, United States of America versus Raymond Negron.

THE COURT: All right, good morning.

MR. AFRAME: Good morning.

MR. KENNA: Good morning.

THE COURT: Mr. Kenna.

MR. KENNA: Your Honor, based on the framework that has been given to us by the *Rivera-Martinez* case and Justice Sotomayor's concurring opinion in the *Freeman* case I think that it's pretty clear that our first issue here is the eligibility for a reduction pursuant to 3582(c)(2), and I would concede to the Court that the plea agreement itself does not explicitly refer to the guidelines, the sentencing guideline ranges, and as a result I think we have to go to the second scenario that is involved in Justice Sotomayor's argument, or decision, and that is where the plea agreement doesn't specifically talk about the guideline range as a basis, does the agreement itself make it evident through its terms what the applicable guideline range was and that it was based on the -- the sentence recommended was based on the guideline range. That's because this is, as the Court knows, an 11(c)(1)(C) plea as opposed to other pleas.

And it is our argument to the Court that in this particular case the plea agreement itself does make it evident that the sentence that was recommended to

the Court by the (c)(1)(C) plea was in fact based on the guidelines.

First and foremost, the plea agreement itself tells the Court, and probably more importantly, tells the defendant when he's entering this agreement that the Sentencing Reform Act does apply, and that is specifically in Section 5 of the plea agreement which I'm sure the Court has available to it.

And then in the computation of the guidelines, again, the government itself in the plea agreement refers to the guidelines because the government agrees in Section 7 that they will not oppose a three-point adjustment, two points for acceptance of responsibility and the additional point for prompt recognition, and that is specifically agreed to in Section 7. That's a specific referral to the guidelines.

More importantly I think is the fact that the plea agreement stipulates in a very, very specific way to each and every event that Mr. Negron was pleading to, to each and every specific type of drug that was involved in the event, and to each and every specific amount of drugs that was applied.

So, when you talk about the total offense level and figuring out from the guidelines what the total offense level is, that refers specifically to each and every one of those agreements and stipulations that we made in the plea agreement.

And I note, your Honor, although I'm not -- I know the Court isn't looking to the PSI for evidence in this particular case, but I do note that those agreements and those stipulations that were part of the plea agreement itself are specifically recorded and specifically delineated in the PSI and in the

determination of the proper sentencing guideline. So, in terms of the total offense level, everything within the plea agreement that was stipulated to came out to exactly what the total offense level is.

In this case, and this goes back to the *Rivera-Martinez* case where there was no, actually no comment whatsoever in the plea agreement about the Criminal History Category, there was no specific reference to the Criminal History Category in this plea agreement that can't be disputed. However, if you look at this man's history, I just would suggest to the Court that cannot be the controlling factor alone in this particular case because no one could possibly have expected us to ever disagree on his Criminal History Category. He only had one conviction that ever counted, and we all knew that, it was a DWI Class B misdemeanor in state court that resulted in a conviction on a DWI case. And that's all he had that counted against him in terms of criminal history, and neither the government nor we could possibly dispute that, it was a matter of record that we all knew.

So, I would suggest to the Court that although that's not specifically listed in the plea agreement as being the Criminal History Category, there couldn't possibly have been any dispute on that. And I don't think the Court in deciding this case should assume that we are going to put something like that into a plea agreement when it's just a non-issue. It never could have been, possibly been an issue.

So, I think that it was very clear from the terms of the plea agreement itself that a sentencing guideline range was evident, that we all knew what the sentencing guideline range was, and then if you go back to the sentencing transcript, your Honor, I want

to assure -- I want to point out to the Court that in your colloquy with Mr. Negron, you specifically said to him that you could do a collateral attack if it's resulting from some kind of new law. And this is a new law. This is something that I think is contemplated by his plea agreement understanding that if something like this occurs, we can come back and ask for a sentence reduction under 3582(c).

THE COURT: But what is interesting here is that this record is a very complete record when you think of it. We don't always have statements made by the judge at each stage of the proceeding as to what the judge is considering.

MR. KENNA: Right.

THE COURT: But in this case I must say I did a fairly thorough job of stating what was happening at each stage of the proceeding, and what's interesting about this whole issue is that the appeals courts focus so much on what happened on the terms of the plea agreement, and that seems to become all controlling when in fact the sentence is imposed by the judge, and the judge goes through a calculus and through a careful process of considering many, many factors in determining what the sentence should be, and I did that here.

MR. KENNA: You did.

THE COURT: I started out with a consideration of the Presentence Investigation Report, and then the guidelines were calculated, which judges are required to do, and then --

MR. AFRAME: I -- I mean, this would be a point to respectfully disagree with the premise that you're

setting up, so when you're done I will do that to make our conversation more enriched hopefully.

THE COURT: Well, well, I mean, I realize that what I'm saying, what I'm saying is what the plurality has said in the *Freeman* case.

MR. KENNA: Right.

THE COURT: And that was done I think carefully in this case. I went through those -- I took those steps. I calculated the guideline. You can sit down. You will have a chance to talk.

MR. AFRAME: Okay, go ahead.

THE COURT: I calculated the guideline, and then I rely in part on what those guidelines were advising when I decided whether or not to accept this plea agreement. I wasn't bound to accept it. It was nothing that made that binding on me. I could have rejected it. But in deciding whether or not that was an appropriate sentence, I considered the guidelines. They were important in my consideration.

MR. KENNA: And --

THE COURT: So, from my perspective the sentence was based in significant part on those guidelines. They were the foundation from which I started my thought process about what was an appropriate sentence.

We then have of course the variance procedure that we follow now. In order to vary, you have to vary from something. And what do we vary from? We vary from the guidelines. And that's what happened here. This was an upward variance. There are downward variances as we know.

So throughout the process the guidelines were an integral part of the sentencing process.

Now, I know that the, I understand Justice Sotomayor has said, and this has become some kind of a plurality opinion, I think the matter is far from clear quite frankly, and Justice Selya, you know, did a very good job of trying to parse the various issues here, but this was back in, when, 2011 I guess, that these opinions came down. The amendment came out, the retroactive application of the amendment came out in July of 2014.

MR. KENNA: Right.

THE COURT: Is there, have you found anything in the, either the commentary or anywhere that indicated that when this amendment was enacted that it intended to exclude an entire class of defendants?

MR. KENNA: I did not. I'm just reading Justice Sotomayor's opinion, your Honor.

THE COURT: Do you find it odd that a class of defendants is being excluded when certainly the public policy statements about these amendments are pretty clear that they want to mitigate the effect of significant sentences that have been handed down in drug cases.

MR. KENNA: I do, your Honor, and I think there's been some comments about whether this is a fair application of the rule, but we do have -- we have the Court's order and the Court's decision, and I think that that decision is based -- I don't think that decision precludes this particular defendant. Certainly the plurality, the four justices in the plurality that feel as you obviously feel, are what we

believe the law should be and would be the fair and just law, and that would allow anybody to come back if they were involved in these types of offenses, come back and ask for a sentence reduction in these kind of cases including an 11(c)(1)(C), because that doesn't end the inquiry. That doesn't mean you have to do, you have to give a reduction, it just makes them eligible. And I think that's the issue that we're talking about right now.

And I just, I want to just strengthen I think a suggestion that you're making, your Honor, by your comments in the sentencing and in your judgment too. You specifically say I'm looking at the guidelines and I see that this is just about exactly two times the highest end of the guideline. You make specific reference to it in your acceptance and your understanding of where the plea came from and what the agreement between the parties were or where we came to that type of an agreement.

So, there's very little I think in the record that would indicate that that plea agreement did not, was not based on the guideline evaluation that we all had that was very clear in a case like this. I'm not so sure it was clear in *Rivera-Martinez* but in this particular case it was clear what the Criminal History Category was, and it was very clear and stipulated to what the total offense level was, and with that in mind you made a finding that what we decided, what we were recommending together to the Court was reasonable based on where he was in the guidelines. And I think that makes him eligible, at least eligible at this point in time for argument for that reduction, and that's exactly what I think we're arguing to the Court.

THE COURT: All right.

MR. AFRAME: I certainly agree that you thought about the guidelines when you imposed the sentence. But as a reality you were actually faced with a very limited choice. You had a choice. You could accept 144 months and impose it, or you could turn to the defendant and say I'm not going to accept this plea agreement, you now, defendant, have a choice. You can plead naked and I will engage in the typical sentencing process and I will pronounce a sentence upon you, or you can choose a trial.

And so that's the decision that the Court made. And I understand as a matter of practice you understandably are desiring a measuring stick to decide how you should exercise that choice that the (c)(1)(C) plea gives you, and it makes complete sense to use the guidelines for that purpose.

THE COURT: And indeed, yes, I'm required to, I'm required to refer to the measuring stick.

MR. AFRAME: We could debate that.

THE COURT: I'm required to calculate the guideline; right?

MR. AFRAME: You certainly are in a non-(c)(1)(C) type situation. I'm not sure that one -- but I know that you do and it makes sense to do so, but I think that's sort of an academic argument, why wouldn't you, it gives you a benchmark to make your decision which is the limit -- your usual decision is I can sentence you, Mr. Defendant, from anywhere from the stat max down if I apply, if I calculate the guidelines and I apply the 3553(a) factors and I provide a plausible rationale, I can sentence you anywhere from, assuming no mandatory minimum, zero to the stat max.

In this kind of case the parties have limited what is that normal authority that you have to only the question of will I, the Court, accept the plea agreement or will I not. And if I don't, that triggers certain rights of the defendant that he may invoke or he may not invoke.

So that's the procedure that we're in.

THE COURT: One other option if the Court determined that it would not accept the plea agreement is to impose a sentence --

MR. AFRAME: I don't think that's correct.

THE COURT: -- and then allow the defendant to withdraw his plea.

MR. AFRAME: I mean, I think 11(c)(1)(C) says should the defendant, should the Court reject the plea agreement, the Court must offer the defendant the opportunity to withdraw the plea.

THE COURT: But it doesn't say how the Court is to reject the sentence.

MR. AFRAME: Well, I mean --

THE COURT: The Court can reject the sentence by imposing another sentence and then turning to the defendant and say we're going to take a recess. You can decide whether you want to accept this sentence or not.

MR. AFRAME: Well, sure, I don't know if you could impose it. I think what you could do, and I've seen this done is, you know, defendant, the government is overly harsh here, they want 144 months. If you -- I'm not going to accept that. I'm telling you that if you choose to go through with the plea today I will sentence you with a hundred months.

Well, obviously, by telegraphing it we know what the defendant will do.

THE COURT: Okay, let's not get sidetracked on that.

MR. AFRAME: And so I think that what the Court is getting here, this case is an example, this sentence is way above the guideline range. That's because the government forbore a 924(c) offense that would have been 120 months, so there's a whole constellation of facts beyond the guideline range that went into this stipulated disposition that the parties reached about what is the appropriate resolution of the case. And I think the concept is that agreement, as expressed like all contracts within the four corners of the agreement, is the sentence that the parties believed was appropriate that were asking the Court to bless.

The Court has a process that involves the guidelines to do that, but all it's doing is blessing the parties' agreement. That's what the Court's doing. And when it does that, since that's all it's doing, there's nothing that requires that the parties' agreement be based on the guidelines. It can be based on the guidelines or it could not be based on the guidelines. And that's what Sotomayor slash Judge Selya are getting to. We need to figure out was it based on the guidelines or not. And like all contracts you try to look at the plain language of the contract. And the plain language of the contract here is the plea agreement. And if the plea agreement says this agreement that we're asking the Court to bless is based on the guidelines, then 3582(c) is triggered.

If the contract doesn't make that clear, and in fact I think this contract makes it clear it wasn't, that it was based on the forbearance of the 924(c) charge, then it's not based on the guidelines and the 3582(c) is not the implicated.

I think that's the thinking. I understand it leads to some discomfort, believe me, I do understand it.

THE COURT: But what about the policy behind what the Sentencing Commission has done here? In other, words, we're going to have a whole class of defendants who are not eligible for --

MR. AFRAME: We have a class of defendants, of career offenders who don't benefit, we have a class of, we have different classes, you known, sometimes the plan language of the law which it's based on doesn't always lead to writing on a clean slate I suppose. I mean, a C-plea is created on a scenario because they can be based on many, many different factors, but it wasn't an omnibus authority to lower drug sentences. It was a limited authority to reduce drug sentences that are based on the guidelines, and that the Court determined that a sentencing range, given all the factors here that I think is double the guideline range was correct, just means you thought about the guidelines, which is completely obviously reasonable to do. If I were in your chair is how I would do it because you're trying to think about did the parties come to some conclusion that made sense within the range of reasonable sentences such that I'm willing to put the judicial seal on the parties' disposition. And if parties come in here and want something widely unjust, the Court's not going to do it. And that's why it's using the guidelines to think about what the parties reach. But it's pretty evident to me that the

Court is going way above the guidelines which is a class -- Criminal History Category I, was moved by the seriousness of the offense and the government's forbearance of a 924(c) charge that would have caused a much higher sentence, and all of that I'm sure was the thinking here.

And so this sentence wasn't really based on the guidelines, it was based on the government's decision to forebear. That's why the sentence is much higher than the guideline range. And to say that this person has been unfairly treated by the drug guidelines, at least in these facts, doesn't make sense to me. I can see the case where it does. So, I can see the case where the parties negotiated about the drug guidelines, and then they just put in the sentencing agreement the parties stipulate to a sentence of 48 months and that is the guideline range. It is nothing but a drug count.

And then I see the policy concerns that you're raising. I don't have a good answer to them other than sort of a legalistic answer. I don't think they are implicated in this case, but I understand them, which I think is the best I can say about the policy issue.

You asked about there were no changes made to 1B1.10. The commentary does not reference this agreement that I'm aware of at least, to the *Freeman* decision. I know that the DC Circuit has disagreed with *Rivera-Martinez*'s construction of that opinion.

So, it's -- it comes down to a view of what you view is going on in an 11(c)(1)(C) proceeding I think is what the disagreement is.

THE COURT: Well, you agree there's certainly a lot more reference to the guidelines in this case than there was in the *Freeman* case.

MR. AFRAME: Well, I thought in the *Freeman* case --

THE COURT: Well, the *Freeman* case --

MR. AFRAME: *Rivera.*

THE COURT: I mean the *Rivera* case.

MR. AFRAME: Well, in *Rivera-Martinez* they stipulated to the offense level.

THE COURT: But not the Criminal History Category.

MR. AFRAME: Not the Criminal History. Here we have stipulations in neither. We have simply it's a 144-month sentence and the government is going to forbear from filing a 924(c) charge.

THE COURT: But what we don't have, we don't know what other references to the guidelines that may have been in the *Martinez* case.

MR. AFRAME: I think that's fair, but I also think it's fair to point out that there's a much more important reference in the *Rivera-Martinez* case than the ones in our plea agreement, the offense level. That's one of the two integers that put you on the table. Criminal History is missing, *Rivera-Martinez* found that dispositive. We have neither integer in this case.

THE COURT: All right.

MR. AFRAME: I mean, the other arguments for me is there is the reference -- you know, it's a question about, I'll be honest with you, it's a question about our plea practice, whether our (c)(1)(C) plea

should have the acceptance of responsibility language in them or not. I'm not sure of the history of that and that's something that I will consider in my role about whether that makes sense in (c)(1)(C) agreements, but it certainly doesn't --

THE COURT: It never used to be in them years ago.

MR. AFRAME: Maybe years ago, but in my seven years now it's always been.

THE COURT: Yes, but years ago it was never in there.

MR. AFRAME: That's something that I will consider because, again, it is a dissident that probably arises from forms and not thinking it through. Still, it doesn't mean what Judge Selya requires, which are the ability to identify on the table what the guideline sentence would be from the agreement. But acceptance of responsibility to me doesn't have much to do with an 11(c)(1)(C) agreement to a specific term of years.

Now, sometimes our 11(c)(1)(C) agreements stipulate to guideline provisions. That's different. But this (c)(1)(C) is just to a term of months, and I'm not sure that it makes sense to have that particular reference to the guidelines.

Under guideline 6B1.2 it says in the case of a plea agreement that includes a specific sentence under 11(c)(1)(C), the court may accept the agreement if the court is satisfied that the agreed sentence is within the applicable guideline range, or the agreed sentence is outside of the guideline range for justifiable reasons and those reasons are set forth with specificity.

So, interestingly I researched what was the law prior to the advisory guidelines. So in a pre-*Booker* world, if the guideline range were lower -- I'm sorry, if the guideline range were different than the stipulated sentence, does the court have the ability to accept the stipulated sentence. And the cases were actually in dispute. Some cases said yes, the court does have that authority because it's a, for all the reasons I've said, it's a (c)(1)(C) agreement. All the court is doing is deciding whether it's an appropriate disposition, even though the guidelines are mandatory, this is a way around the guidelines. And there was an opinion that discussed how this was a way prosecutors and defense lawyers with the wink of judges essentially were getting around the guidelines because everybody agreed to this lower sentence than the higher guideline range. The court said okay, never got appealed. That issue came up very infrequently. It came up a couple times and the circuit split on it.

So, that issue of how the guidelines interplay with 11(c)(1)(C), even under a mandatory regime, was a complicated one.

THE COURT: All right.

MR. KENNA: May I just respond to a couple points Attorney Aframe made, your Honor.

First, I want to make sure that the Court is aware that we do not agree that neither of the two factors identified in *Rivera-Martinez*, in the agreement, the specific mention to the total offense level, specific mention to the criminal history, I think that the agreement here where it is so specific as to every single drug quantity, drug type and date that a sale

was supposedly made or possession supposedly occurred, which comes out exactly to where the total offense level was, what's missing in there is simply saying as a result of the last four pages or three pages of the plea agreement, we come out to a total offense level of 25. That's all that's missing in there. Other than that, every single element of that total offense level is stipulated to in the plea agreement.

So, I think that a fair assessment of whether the total offense level is referred to in the plea agreement, I think the answer to that is yes, it is. So that's first and foremost.

Secondly, Attorney Aframe has made reference to the fact that the reference in the plea agreement to the acceptance of responsibility issue is, may not be appropriate in a (c)(1)(C) case. That makes it more important since it was in the plea agreement in this particular case. If it's not appropriate in (c)(1)(C) cases, why is it here, because we're referring to the guidelines.

And lastly I think, your Honor -- well, maybe not lastly. I also want to point out to the Court that Mr. Negron in this particular case made it very clear that he was never agreeing that he was guilty to that 924(c) count. That was a count that was in heavy dispute. As part of the agreement the U.S. government did agree that they would dismiss that particular case. But in determining whether he would take a plea such as this, that factor, although it's noted in the plea agreement, that factor is no more important, for example, than what was mentioned at the actual sentencing, and that was that there was an additional possible charge that the government agreed to forebear prosecution on, and I

will tell you it's not in the record, so it's maybe not fair to comment, but that issue, the other possible charge is more of an issue with Mr. Negron than was the 924(c), but it came out to the same place, it comes out to the same place as far as we are concerned.

But I guess lastly and most importantly, what I do want the Court to think about is the fact that when you make your determination of whether or not a recommended sentence under an 11(c)(1)(C) is acceptable to the Court, you're not just making a determination of where you believe the defendant would be on the guidelines and whether it's appropriate, you're making a determination I believe, your Honor, of where did you people come up with this and is your assessment of this situation acceptable, are you coming up with a rational sentence based on what you people were considering. And then of course we mention the fact that in your sentencing you specifically refer back to the fact that what we came up to was pretty much two times the high end the guideline. Again, a reference directly to the guidelines.

And I think with those in mind the Court first has to determine, and we believe, that he is eligible at least to argue for a sentence reduction.

MR. AFRAME: Just one small point on the, I just want to disagree with the offense conduct section, even if it ends up having a quantity that leads to the guidelines that it ultimately comes out to that, that means anything, because of course it's the presentence investigation that leads to what the guideline range is and maybe the defendant agrees to all the facts the probation office ends up finding, often they do not. So those facts are the facts that

the day of the plea the defendant is agreeing to which are supposed to be the elements of the offense so that the Court under Rule 11 can state the factual predicate for the plea. But of course that's not the basis for the guideline range because the relevant conduct investigation is conducted by probation and those are the facts. Maybe in this case they merged, but they very often don't. So I just want to note that the significance of that offense conduct section is, it's not intended, I believe, to be the guideline range because there's another whole process that determines that.

THE COURT: All right, gentlemen, reluctantly I'm bound by the *Rivera-Martinez* case, and this is a close case, but as I see it, *Rivera-Martinez* will not allow me to find that the defendant is eligible for a reduction even though I think he should get a reduction based on everything I'm aware of in this case, but I think *Rivera-Martinez* really ties my hands. And if he were eligible for a reduction, then using the proportionality of the other sentence, of the current sentence, he would be eligible in my view to a reduction to 116 months. That's twice the high end of the guideline plus two months, which is what was imposed, the current sentence.

So, I think it's unfortunate that we sort of have a whole class of defendants here who are being excluded, but that's really not at issue here. I think there's a much closer case than these others, but it doesn't fit the parameters that Judge Selya has set down, and therefore I have to deny your request, but I invite you to appeal.

MR. KENNA: I will contact Mr. Negron today, your Honor, and discuss that with him.

THE COURT: Because perhaps we can get some further clarification out of the circuit.

All right, thank you very much.

MR. KENNA: Thank you, your Honor.

(Hearing concluded at 11:50 a.m.)

C E R T I F I C A T E

I, Sandra L. Bailey, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted:
12/7/2015 /s/ Sandra L. Bailey

SANDRA L. BAILEY, LCR, CM, CRR
LICENSED COURT REPORTER,
NO. 15
STATE OF NEW HAMPSHIRE

APPENDIX C

UNITED STATES DISTRICT COURT
for the
District of New Hampshire

United States of America v. Raymond Negron	))) Criminal No. 12cr110-01-JD) USM No: #12756-049
Date of Original Judgment: October 10, 2013	)
Date of Previous Amended Judgment: ___ (*Use Date of Last Amended Judgment if Any)*	) Bruce E. Kenna, Esq. Defendant's Attorney

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of ☐ the defendant ☐ the Director of the Bureau of Prisons ☒ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion, and

taking into account the policy statement set forth at USSG § 1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent they are applicable,

IT IS ORDERED that the motion is:

☒ DENIED for the reasons stated on the record at Oral Argument, July 22, 2015.

(Complete Parts I and II of Page 2 when motion is granted)

All provisions of the judgment dated October 10, 2013 shall remain in effect.

IT IS SO ORDERED.

Order Date:	July , 2015	/s/ Joseph A. DiClerico, Jr. *Judge's signature*
Effective Date:	*(if different from order date)*	Joseph A. DiClerico, Jr., United States District Judge *Printed name and title*

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * * * * * * * * * * * * * * * *		
UNITED STATES OF AMERICA	*	12-cr-110-01-JD
	*	September 16, 2013
v.	*	11:00 a.m.
	*	
RAYMOND NEGRON	*	
* * * * * * * * * * * * * * * * * * *		

TRANSCRIPT OF SENTENCING – DAY 1
BEFORE THE HONORABLE
JOSEPH A. DiCLERICO, JR.

Appearances:

For the Government:	Terry Ollila, AUSA U.S. Attorney's Office 53 Pleasant Street Concord, NH 03301
For the Defendant:	Bruce E. Kenna, Esq. Kenna & Sharkey, P.A. 69 Bay Street Manchester, NH 03104
Probation Officer:	Janice Benard Scott Davidson

Court Reporter: Diane M. Churas, LCR, RPR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1442

BEFORE THE COURT

THE CLERK: The Court has before it for consideration this morning a sentencing in Criminal Case 12-110-01-JD, United States of America versus Raymond Negron.

THE COURT: Good morning.

ALL: Good morning, your Honor.

THE COURT: The Court has a Presentence Investigation Report before it. Have you had a chance to review that with your client, Mr. Kenna?

MR. KENNA: Yes, your Honor.

THE COURT: Are there any exceptions or objections that you would like to take up.

MR. KENNA: I think, your Honor, the exceptions or objections that we made to the preliminary report are all accurately identified in the final report, but there are two different areas of the final report that we do want to address, and I think one is 73 and the other is 74, paragraphs.

THE COURT: Um-hum.

MR. KENNA: 73, first of all, your Honor, Mr. Negron might want to address the Court on this also. But we acknowledge in fact that there is what I believe to be an older Manchester Police Department arrest report from back in around 2006 I believe it is that has on that a list where it lists gang affiliations on that report, and it says that he's affiliated with The Bloods.

Mr. Negron adamantly denies that he has ever had any affiliation with any gang whatsoever, particularly with The Bloods. And I represented him

back in 2006. He's been trying to fight this issue since the time that was put on that first report in 2006, and he wants -- what we would like the Court to do is -- unless there is other than just that one police report, we would like that taken out of this particular report.

He is expected -- we expect that he is going to serve a substantial period of time incarcerated, your Honor. This affiliation or allegation of an affiliation is going to follow him in everything he does and wherever he goes. It's going to affect his classification, it's going to affect where he goes and the kind of programs that will be available for him, and mostly it may affect his relationships with other inmates. And he has been adamant since the time this first appeared on the report that there's absolutely no evidence whatsoever, and we were never given any evidence, indicating why they put that affiliation into the original report. I don't think I've seen it since 2006, since the period of time that we are referring to, but it is there, and now it's referred to in this PSI that is going to follow him wherever he goes within the prison system.

If you are a member of The Bloods, it is my understanding -- and Mr. -- by the way, Mr. Negron went to the extent on this occasion of getting a letter written by a member of The Bloods, who is also incarcerated, indicating that if he was a member of The Bloods, you'd be able to tell that by having some type of an indication that he was a Blood member. I guess what they do is they have certain tattoos that they might have on their body that will identify them as a Blood member, and he has no tattoo that is affiliated with The Bloods whatsoever. It's clear that some of the ones that are known as tattoos that

affiliate you with The Bloods are clearly not -- he doesn't have them. And that inmate that he had write a letter for him also indicates that there's no way that you are a Blood member unless you have some type of insignia indicating that that's the case.

We don't really know where this came from. Even back in 2006 we were never given an explanation as to how this ever got on an original police report. His offense back then wasn't affiliated with The Bloods or anything along that line. It just didn't have any connection. He wasn't living with a Blood. We just don't know where it came from.

But it can be extremely damaging. There's no evidence of any such thing. This can be extremely damaging and extremely dangerous for him if it follows him throughout his stay in the prison system.

I'm not sure whether Mr. Negron wants to address you on this issue. But we assure your Honor he has never had any affiliation with The Bloods. We don't know where this came from whatsoever, and we don't want this on his record going into the prison with him.

MS. OLLILA: Your Honor, if you look at paragraph 73 on page 18 of the PSR, the defendant's vehement objection is laid out in that paragraph. One of the reasons for presentence investigation reports to include gang associations is to put members of the Bureau of Prisons on notice.

The fact the defendant objects to it is in the PSR. So the BOP will understand that the defendant denies the association. I'm holding on to what --

THE COURT: Well, but what -- this comes from -- the statement here is that he is a known member of

The Bloods gang. That is a very strong statement that evidently appears in a police report, and it's a statement that he vehemently denied.

Now, BOP isn't going to conduct an investigation into this. The chances are that the BOP may well take the police department statement, which may not be true.

MS. OLLILA: Understood.

THE COURT: Or it may be based on speculation or other evidence.

MS. OLLILA: Understood. And I apologize, your Honor. I'm covering for AUSA Jen Davis. I can track this information down from the Manchester Police Department. I am holding on to -- this doesn't address your Honor's concern, but I'm holding on to a Manchester Police Department rap sheet, which is three pages, dated June of 2013, and the rap sheet includes the defendant's name, address, all of his tattoos. The rap sheet itself, if you look at it, everything on the rap sheet is consistent with known information from the defendant, such as, prior addresses, prior family members. It says, for example, caution, armed and dangerous, guns on person, uncooperative with law enforcement.

Those are all based upon known prior arrests of the defendant. So it is true that -- I'm not addressing your concern, your Honor, because I can't address it until I speak to the Manchester Police Department and find out how they made that connection.

Attorney Kenna indicates that Blood members have tattoos. That's true for some Blood members. The vast majority of the members of the Blood gang do not wear those tattoos. Why? Because then you

are advertising yourself to law enforcement as a member of a gang. Most Blood members show their identification by wearing colors of red. So that he doesn't have a tattoo means nothing.

I still can't address your concern, your Honor, until I find out from the Manchester Police Department where they got this information. I'm sure they got it from numerous confidential informants. I could provide that information to you if I had some more time. And again, I apologize that I was not prepared in order to address your concerns.

THE COURT: I understand you're standing in.

MR. KENNA: Your Honor, we've objected to this being in the probation report right from the very beginning. Today is the day. If the government wanted to provide you with other evidence, then they should be available to do it today, not at some later time.

THE COURT: Mr. Negron, did you want to say something about this?

THE DEFENDANT: Yes, your Honor, I would. I've lived in Manchester several years, approximately 12, 13 years. There's never been a gang problem from what I have seen in Manchester.

I've always been a hard worker. I've never had time for a gang, let alone having to stick up for somebody else in a gang, which is -- it's based on violence. As you can see in my record, I'm not a violent person. If I was in a gang, there would more than likely be a clear indication that I would be. If you look at my previous work record, I worked at Team Nissan Center Car Sales. I also worked for a mortgage brokerage in the United States, called The

Mortgage Specialist, as a mortgage broker. These guys have a very stringent -- not stringent. They're very specific in who they hire. If even these people had any indication that I was a gang member, I'm pretty sure I wouldn't have been hired working in the positions I worked. If I walked around with that persona, I never would have been able to accomplish what I have.

So I can't possibly tell you how the police put that in there, but there's also things that they put in the police report that says I'm armed and dangerous. Manchester Police Department gave me a concealed weapons permit which Bruce Kenna knows about. If I was armed and dangerous, why would they give me a concealed weapons permit. Also it indicates that I don't cooperate with the police.

Bruce here could testify -- this is his legal consultation to me. He said you should never answer any kind of police officer's questions. And Bruce has been my attorney for ten years. All I'm doing is just exercising my right, which I have whenever I get any type of police contact, your Honor.

The whole gang -- I'm a man -- not to throw out hot air, but I think the whole gang thing is just for kids. I don't believe in it. On top of everything, from my understanding until I just recently got incarcerated, I thought The Bloods gang member association was only for black people. Never heard of a Hispanic being there. I think I would be more understanding if they said I was in a Hispanic gang or a gang -- a Blood gang? You only hear that on the west coast. You don't hear about that over here.

I really would not like to have this follow me to anywhere that I would go to, type of jail. If I go in there, the BOP sees that, they're going to label me as a gang member, and from my understanding if any altercation happens with a gang member in the Bloods that's in incarceration, I can get charges for that. If I'm going to have to end up doing any time in prison, I'd like to do it peacefully and not have something like this cloud who I am. It's just preposterous, your Honor.

THE COURT: All right. Does probation have anything to say about it? Is this just sort of taken -- just reporting what was there?

MS. BENARD: Correct, exactly. It's listed on hi s rap sheet.

THE COURT: You don't have any knowledge of that.

MS. BENARD: Nothing additional as to how that information came to be on his report.

THE COURT: The concern is police reports contain a lot of information, necessarily so because they put it together and so for future reference. It doesn't mean it's always accurate. Many times it isn't accurate. But that's all right. It's all part of the history that they put together in the performance of their duty, but something like this I think does have the potential of creating some difficulties for a defendant.

So ordinarily we don't go spend a lot of time going behind these reports, but I think gang association can be very detrimental to a person in prison, not only in terms of the prison administration, but also in terms of relationships with other individuals incarcerated,

other prisoners. So I think there's an issue here which should be resolved.

MS. OLLILA: Sure. I understand, and you know, Judge, just a point of clarification. I think to the extent to which your Honor has a tough decision to make, the United States should get more information, and I'd simply ask you to take with serious caution the statements that Mr. Negron is saying in court.

Last week -- I can probably name 15 Hispanic Blood members, the most recent of which was last week, Cesar Abreu, who was sentenced in this very court. Cesar Abreu is a Hispanic Blood member, has always worn the color red, does have some Blood tattoos but hidden on his body. Doesn't have the stereotypical three dots on his hand which is indicative of Blood members.

Mr. Negron is also telling you that he has had employment in the past, and the employment he has had would show you that he's not a Blood member.

Not true at all. Most Blood members have employment. So Mr. Negron, what he's saying -- I can't verify this as I'm standing here, Judge, but I can tell you that one or two calls to the Manchester police, I can hunt down how this information came about, what the association is, and why Manchester believes he's a member of The Bloods.

MR. KENNA: Strangely enough, your Honor, Mr. Negron has a letter -- I think I mentioned to you earlier that he had talked to a Blood member that's still in -- was incarcerated along with him. It happens to be Mr. Abreu who explained that there is no way that this guy could be a member of The Bloods. Mr. Abreu is a member, and he explains why

he could tell he's not a member of The Bloods and it comes directly from Mr. Abreu.

MS. OLLILA: Exactly why you shouldn't believe what Mr. Negron is saying. He says Hispanics aren't members of The Bloods. Yet he is holding onto a letter, Judge, from Cesar Abreu that I had no idea about this letter until he said it. But I know exactly who Cesar Abreu is. He is not credible. He should not be believed in any capacity.

MR. KENNA: Your Honor, I think what Mr. Negron said to you was he was unaware of the fact that any Hispanics were involved with The Bloods. He thought it was an all black association.

He knew about this because he talked to Mr. Abreu. That's the first time when he's learning about this, when he's talking to him and saying I'm not a member of The Bloods, and he talks to him. That's the first time he knew. Up until that time, he didn't even think Hispanics were involved in the group whatsoever.

MS. OLLILA: But he didn't say that, Judge. He said he thought The Bloods were an all African American association to you, and now he wants you to believe Cesar Abreu who, like this defendant, is Hispanic.

THE DEFENDANT: Your Honor, if you want go back to what I said, I'm assuming that's right, the stenographer will reiterate what I said. What I said was until I've been incarcerated, I didn't know that Hispanics -- it was an all black gang and Hispanics weren't allowed to. I'm ignorant to the fact of gangs. I understand the prosecutor is trying to make a point,

but I didn't know, sincerely, about a gang member. That's not my lifestyle. I don't carry myself like that.

If you want to prove a point, you can go back and reiterate what I said in there, just to prove the point, please. I prefer you did.

THE COURT: All right. Do you want to just read that back. Can you find that part of the transcript ?

(Discussion off the record.)

THE COURT: All right. We are back on the record. You had another objection; am I correct?

MR. KENNA: Yes, your Honor. And I think this one is at No. 74, the very next one down.

THE COURT: All right. 74, all right.

MR. KENNA: In the initial pretrial investigation report when it talked about the physical condition, that is, paragraph 74, it began with the sentence that's on the following page, on page 19. Concerning his physical health, Negron advised that he suffers. That was also in the original presentence report. The final presentence report has added all of this information at the beginning, all of which is correct, your Honor, except for translation where it talks about how tall he is, how much he weighs, and about the tattoos. Well, Mr. Negron is extremely concerned that you're getting a different view of him than he really is. So where the second sentence says: He reported the following tattoos. Number one, a spider with the words "muerte a los chotas," which translated means "death to cops." That is, by the way, a tattoo that he has. The physical description of the tattoo is accurate. There's no question about that.

Mr. Negron, however, he just talked to me about this this morning because it wasn't in the original report, and he would tell the Court that that translation is inaccurate as it relates to him, and what he brought me in today was two or three different Spanish-American dictionary translations of the word "chota" or "chotas," which had nothing to do with death to cops. And he can read those to you.

I did have the opportunity prior to the hearing this morning, along with the government and with Officer Benard to see where she came up with that particular translation. She's gone on Google and to different Spanish dictionaries where it does say exactly what she says that it says.

I think the problem is that depending on where you live and what book you are looking at, there are obviously -- and I think in my experience have learned that there's all kinds of different translations for similar words, different meanings according to the dialect that they are using. So Mr. Negron would vehemently tell you that he does not have a tattoo that says "death to cops" on his chest. That it says "death to weakness" essentially is what it says. But it does not have anything to do with cops and he does not want this Court to get that impression of him.

THE COURT: Well, I guess we are getting into translation issues now.

MR. KENNA: Exactly. And there are, your Honor -- I mean, I have to tell you, I've seen the definitions that Officer Benard brought up from the Internet, and I've seen the definitions that Mr. Negron has given me, has brought in today from the Merriam Webster Spanish English Dictionary, University of

Chicago Spanish Dictionary, and Oxford Spanish English Pocket Dictionary, all of which say nothing to do with police or cops for the same word.

THE COURT: Well, I think we've got to look into that further then because I don't speak Spanish. So I can't -- I'm going to need assistance on this. And we have to address the gang issue.

So what we'll do -- I'm going to continue the hearing so that, number one, we can get more information on the sources for this statement in the Manchester Police Department report and, number two, translations, how this is going to be translated.

So I want the probation officer to review various translations, and then if you would also, Mr. Kenna, review some translations and perhaps we may need the assistance of an interpreter.

MR. KENNA: All right. If it please the Court, do I have to apply for money to get an interpreter that will talk to me about the case?

THE COURT: Yes. Because that's -- I'm going to need that type of help in order to resolve that issue. I fully understand that words can have different -- the same word can have a number of different meanings and -- depending on the circumstances, but I have to be informed about that. I just don't have the information now to be able to make that decision. Yes?

THE DEFENDANT: I took the liberty of looking up at the World Almanac and found out there's a total of 27 Spanish-speaking countries in the world. Each country has its own version or dialect of Spanish. I know from experience of speaking with people of Mexican dissent there are words which are

very hospitable in Puerto Rican dialect, and if speak from a Mexican dialect, they would find it offensive and vice versa. A perfect example would be a storage space in an automobile in the United States is considered a trunk, but you go to England, which speaks English as well, and it's called a boot. Law enforcement is a police officer.

So the tattoo that I put on my chest -- I'm deep when it comes to symbolism. For example, on my right arm I have the Puerto Rican flag, obviously from where I was born. On my left arm I have God's praying hands. It says God bless, and I list everybody in my family, my mother, my father, my brother, my sister. I have words on my back that say todo tiene sufinal, which means everything comes to an end, and I put it on my back so I could remind myself to put things behind me so I could see forward. After I was incarcerated I put a definition of the words. "Muerte a los chota" means weakness or to be in a weak or mental state. And I know grammatically it won't make sense when you translate a lot of times English to Spanish, doesn't necessarily make grammatical sense, but it's a saying that we have in my country that when you're being weak, you're being a chota. So muerte a los chota, death to chota means to distinguish that mental state. So that I'm fully aware, when I put it on my chest, every time I look at myself in the mirror I can remind myself of that. It has nothing to do with law enforcement. With all due respect if I was to insult a police officer I could have used policia, which means police or police officers, in a disrespectful manner. I can use -- people use a derogatory word for them, as in pigs, with all due respect. I apologize. I could

have put a spider eating a pig or anything of that nature. The only reason that there is a spider on my chest is when the gentleman was doing the tattoo, he suggested it and he put it in.

THE COURT: When was that done?

THE DEFENDANT: That was done -- Bittersweet Tattoo on Elm Street in Manchester.

MR. KENNA: When?

THE DEFENDANT: The full tattoo was complete -- probably begun around June. Probably July. Everything was done by the end of July.

THE COURT: Of '13. Of '12.

THE DEFENDANT: Yeah, 2012, your Honor. And if you want I can get you a letter of recommendation from the tattoo artist. I can have my people contact him, send it out to verify the date.

But I have no quarrel with the police. I understand they're a necessity in society. I don't have -- there's a lot of bad things that go on, so they even out society, how it is. I don't have no problem with the police department. Especially now that I got arrested, they're just doing their job.

THE COURT: Well, I think it would be interesting to find out -- we're going to learn something about the translation of this word, but also it would be interesting to find out what this tattoo parlor, what their version of it is.

MS. OLLILA: I plan to call them and subpoena them as soon as we end this hearing, Judge. They will be here.

THE COURT: See why -- I mean, this is a tattoo that they must put on.

THE DEFENDANT: Yes.

MS. OLLILA: I find it interesting, by the way, that it's a black widow spider, and the defendant says black widow spiders are deadly. The defendant says it means death to weakness. Weakness is not a physical thing, but black widow spiders kill entities, people. So I think it makes more sense -- I don't disagree with what he's saying. We will find out, but I think it's interesting why there would be a black widow spider there.

THE DEFENDANT: The tattoo artist's name is -- his nickname is Slick, if you'd like to subpoena him.

THE COURT: All right. We'll see what Slick has to say about it and we'll reschedule the hearing once this information has been assembled and then we'll take up these issues.

MS. OLLILA: Thank you, Judge.

MR. KENNA: Your Honor, while I have him here today, one of the things that was mentioned in the probation report is that we were going to update the Court at the time of sentencing on the programs that Mr. Negron did during the course of being up at the Strafford County House of Corrections. I do have those documents for you.

THE COURT: All right. Yes, please leave those.

All right. Very good. So those were the two main objections that you had to this report.

MR. KENNA: Yes, your Honor. The rest of the report, we made some objections to it, but I think they've been resolved during the course of the report itself accurately.

THE COURT: All right. Very good. So we'll continue this once this new information has been assembled and we'll carry on with the hearing.

MS. OLLILA: Thank you so much, your Honor.

THE DEFENDANT: Thank you very much, your Honor.

(Adjourned at 11:35 a.m.)

C E R T I F I C A T E

I, Diane M. Churas, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 3/28/14 /s/ Diane M. Churas

DIANE M. CHURAS, LCR, RPR, CRR
LICENSED COURT
REPORTER, NO. 16
STATE OF NEW HAMPSHIRE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	*	12-CR-110-01-JD
	*	October 10, 2013
v.	*	10:05 a.m.
RAYMOND NEGRON	*	

TRANSCRIPT OF SENTENCING HEARING BEFORE THE HONORABLE JOSEPH A. DICLERICO

APPEARANCES:

For the Government:	Jennifer C. Davis, AUSA U.S. Attorney's Office
For the Defendant:	Bruce E. Kenna, Esq. Kenna & Sharkey
Probation:	Jodi Gauvin
Court Reporter:	Susan M. Bateman, LCR, RPR, CRR Official Court Reporter

United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1453

PROCEEDINGS

THE CLERK: The Court has before it for consideration this morning a continuation of a sentencing hearing in criminal case 12–110–01–JD, United States of America versus Raymond Negron.

THE COURT: All right. Good morning.

MS. DAVIS: Good morning, your Honor.

MR. KENNA: Good morning.

THE COURT: We recessed the hearing last time because there were two issues that Mr. Kenna had raised with respect to the Presentence Investigation Report.

Did counsel have anything to report to the Court at this point in time?

MS. DAVIS: Your Honor, at the conclusion of that hearing AUSA Ollila informed me what had transpired at the initial sentencing hearing.

As a result of the hearing, she sent out an e-mail to her law enforcement contacts, an extensive e-mail requesting any information about the defendant's gang affiliation. The responses were all in the negative.

I informed Mr. Kenna of that and we informed the probation officer of that, who I believe at the conclusion of today's sentencing hearing will issue an amended report removing – – striking that language from the initial report and including an addendum to the effect of the information I just reported to the Court.

THE COURT: Well, where did this come from then? Where did this – – I mean this – –

MS. GAUVIN: It did come from the Manchester Police Department arrest reports, your Honor. Information that was contained in discovery for his criminal record.

THE COURT: All right. But as we thought, this was just – –

MS. DAVIS: Yes.

MR. KENNA: Just to remind the Court, there was a report. We've had issues with this report since like 1970 – – 19 – – 2006. It did list that, and that's only place I've ever seen it.

THE COURT: All right.

MS. DAVIS: We did confirm that that's not the case.

THE COURT: All right.

MS. DAVIS: With respect to the second issue which arose at the prior sentencing hearing regarding the translation or meaning of the defendant's tattoo, the government reached out to Rafael Rodriguez, who as the Court knows is often here as the court-certified interpreter.

Mr. Rodriguez confirmed in his opinion and would have testified in his opinion, given that the defendant is of Puerto Rican descent, the meaning within – – in that context of his tattoo would be death to snitches, not death to cops.

Again, I informed Mr. Kenna of that and probation of that fact, and I believe Mr. Kenna has something to add on that topic

MR. KENNA: I do, your Honor.

THE COURT: Okay.

MR. KENNA: Again, I would ask that the report specifically take out the translation of death to cops, because I think now we all can agree that that – – that is a meaning, by the way, of that particular phrase, but it's a meaning in the dialects from South America – – from Mexico and South America, not from Puerto Rico, which is where my client is from.

I also want to address the Court on what Mr. Negron says that that meant to him when he had it placed on his chest.

First of all, I did – – I also did contact two separate translators, your Honor, from Puerto Rico who were able to translate for me in the Puerto Rican dialect, and I agree with the government that both of those translators that I approached also would say that the actual interpretation that they would give of that word is – – they've termed the word squealer rather than snitches, but they – – I think it means the same thing to them.

So I do not have a translator here that would disagree with what the government has proposed here. However – –

THE COURT: Well, why does it need to be translated at all?

MR. KENNA: Right.

THE COURT: You're suggesting that translation be struck; is that correct?

MR. KENNA: I'm suggesting that the translation be struck where it says death – – where it says – –

we're talking about the second translation of the tattoo now, right?

THE COURT: Yes. In other words, why don't we just leave it that this is what it says – –

MR. KENNA: And strike the translation.

THE COURT: – – and strike the translation.

MR. KENNA: That would be fine, your Honor.

THE COURT: Is that all right?

MS. DAVIS: Yes, your Honor.

MR. KENNA: That's fine.

THE COURT: You can do that with the report?

MS. GAUVIN: Yes, your Honor.

THE COURT: All right. And the reference in 73 will be struck in its entirety.

MR. KENNA: I would ask that that be struck in its entirety.

THE COURT: All right. And you will do that?

MS. GAUVIN: Yes, your Honor.

THE COURT: All right. Any other further issues with respect to the presentence report?

MS. KENNA: No, your Honor. I think with respect to all other aspects of the report we do not have any disagreement.

THE COURT: All right. With those amendments, then the Court accepts the Presentence Investigation Report and the guideline applications which result in a total offense level of 25, Criminal History Category of I, yielding a guideline range of 57 to 71 months.

And the government's recommendation?

MS. DAVIS: Yes, your Honor. Pursuant to the binding plea agreement set forth at page 14, paragraph 6(A), we would ask the Court to impose an above guideline sentence of 144 months.

THE COURT: Mr. Kenna.

MR. KENNA: That is what we agreed to, your Honor, in the binding stipulation.

THE COURT: All right. Mr. Negron, is there anything that you would like to say to the Court before the Court acts on this matter?

THE DEFENDANT: Well, your Honor – – good morning, by the way.

I want to thank you for giving me the opportunity to express myself. I don't believe that the PSR and my circumstances actually describe me very well.

Considering the fact that I have drug charges, and gun charges as well, I know I can be seen as a negative aspect when it comes to the community.

My full motivation for why I did get – – I'm being charged to sell drugs was entirely because of my obligations to my family.

I never lived in a life of luxury. I was never caught with a Mercedes Benz or a lavish house or mother. She was very demanding of money and let's just say lazy. It's not an excuse, but I wasn't out to hurt nobody else. I understand that I had many other options that I could have pursued, but I just – – I guess I just chose to do this.

I tried opening my own business to see if I could at least pursue that angle, and it just wasn't working out. Finally, too many obligations just got the best of me.

At that point in time I was thinking of my son's mother, which I had moved to Manchester as well, and me not being with her – – I had to take care of her, you know, in her culture – – she's Dominican. They just like sit back while the man pays all the bills. As much as I tried to educate her to be financially responsible as well, it was just an uphill battle when it came to her.

So I just found myself in a position where I needed money. There's no excuse for what I did. I know that at the end of the day – – now that I'm incarcerated , I'm in there with people that I normally would never associate with. I'm taking classes in like drug and alcohol, and I can see these kids and they're sitting there joking around about their drug use like it's a joke. To be honest with you, I was somewhat disgusted, but then after I got to know them a little bit more I found out they're actually intelligent human beings and very motivated. It's more of a sickness what they did.

So I was able to see the outcome of – – the true victims of my crime, to finally see them. These are not people I would normally see. So I guess – – out of sight, out of mind, I guess is what I'm trying to say.

But right now my family is definitely suffering. I just had another baby in July, July 31st, and my daughter's mother writes to me that she can't pay the rent. My other kid's mother, she has no money. These are all of the things that I was trying to avoid.

I came from a family of poverty. When I was five years old we used to have to use the bathroom in the outhouse in the back of our house when I was in Puerto Rico. So I know what it's like to live with less

and not have. I just didn't want my family to live like that.

But me, acting out of desperation, I think I did my family more harm than good because now I'm here.

I did agree to a twelve year binding plea. My son is 11. When I get out of here, you know, God forbid, he'll be 23. He'll be a grown man. Half of his life I won't be there. If he falls into the temptation to use drugs, his mother – – with all respect to her, she's not all there. She likes to sit in front of the TV. I'm more of a realist when it comes to home. I don't feel he's going to have that guidance that he needs.

And my daughter, God, she's a little girl, you know. There's a thousand things that could go wrong with her.

I just really screwed up. I really screwed up. I know you guys are going to incarcerate me and jail is a mental rehabilitation, but there's nothing worse to me than having to see my family suffer, because without me there they truly are. She's actually right here. She's right here. That's all I have to say.

THE COURT: All right. Thank you.

Please stand, Mr. Negron. The Court will read the sentence. And if either counsel has a legal objection, you can tell me what that is when I finish.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Raymond Negron, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 144 months on each of Counts 1 through 5; 120 months on Counts 6 and 7; and 60 months on Count 8. All such terms to be served concurrently.

It is recommended to the Bureau of Prisons that the defendant participate in the Intensive Drug Education Treatment Program.

Upon release from imprisonment the defendant shall be placed on supervised release for a term of three years on each of Counts 1 through 8. All such terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons the defendant shall report in person to the probation office in the district to which he is released.

While on supervised release the defendant shall not commit another federal, state or local crime, shall comply with the standard conditions that have been adopted by this Court and shall comply with the following additional conditions:

1. The defendant shall not illegally possess a controlled substance.

2. The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

3. Pursuant to law, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons or at the direction of the U. S. Probation Office.

4. The defendant shall refrain from any unlawful use of a controlled substance. He shall submit to one drug test within fifteen days of placement on supervision, and at least two periodic drug tests thereafter, not to exceed 72 drug tests per year of supervision.

5. He shall pay the financial penalty that is imposed by this judgment and that remains unpaid

at the commencement of the term of supervised release.

In addition, the defendant shall comply with the following special conditions:

1. As directed by the probation officer, he shall participate in a program approved by the U.S. Probation Office for treatment of narcotic addiction or drug or alcohol dependency, which will include testing for the detection of substance use or abuse.

He shall also abstain from the use of alcoholic beverages and/or all other intoxicants during and after the course of treatment. He shall pay for the cost of treatment, to the extent he is able, as determined by the officer.

2. He shall submit his person, residence, office or vehicle to a search conducted by a U.S. probation officer as a reasonable time and in a reasonable manner based upon reasonable suspicion that contraband or evidence of a violation of a condition of release may exist. Failure to submit to a search may be grounds for revocation.

The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

The defendant shall pay to the United States a special assessment of $ 800 which shall be due in full immediately.

The Court finds that the defendant does not have the ability to pay a fine and waives the fine.

The defendant shall forfeit to the United States his interest in the property identified in the charging document.

The defendant is remanded to the custody of the United States Marshal.

Does the government have any legal objection?

MS. DAVIS: No, your Honor.

THE COURT: Any legal objection, Mr. Kenna?

MR. KENNA: No, your Honor.

THE COURT: It's my obligation to inform you, Mr. Negron, that to the extent that there are any issues that can be appealed, you do have the right to appeal this sentence to the First Circuit Court of Appeals in Boston. That appeal must be taken within 14 days of when judgment is entered or of any appeal that the government may take. If you cannot afford the costs of an appeal or an attorney on appeal, then those will be provided for you.

In imposing this sentence, the Court has considered the sentencing range under the advisory guidelines, the policies underlying those guidelines, and all of the sentencing factors set forth in Section 3553(a), and in particular, the Court has considered the following matters and has imposed this sentence for the following reason:

1. The Court has considered the government's and the defendant's recommendation of 144 months. The government and the defendant entered into an agreement pursuant to 11 (c) (1) (C) that the government would dismiss Count 9 of the superseding indictment which charges the defendant with possession of a short barrel shotgun during and in relation to a drug trafficking crime, and that the parties would agree to jointly recommend a 144-month term of imprisonment.

The Court has accepted these binding stipulations.

2. Distribution of controlled substances, possession with intent to distribute controlled substances, sale of a firearm to a prohibited person, the possession of an unregistered firearm, possession of a firearm with an obliterated serial number, are all serious offenses which warrant an appropriate term of imprisonment. The significant amount of drugs involved in this case and the gun offenses aggravate the nature of this case.

3. The defendant's Criminal History Category is I, and his prior offenses consist mainly of motor vehicle violations. He has never been previously incarcerated.

4. He does not have mental health problems. He does experience chronic back pain and has a history of drug and alcohol abuse which must be addressed during and after his incarceration.

The Court recognizes that he has made an effort to participate in programs during his pretrial incarceration.

5. The sentence recommended by the parties is slightly over twice the high end of the advisory guideline in this case.

In recommending this sentence, the parties have considered the defendant's age, his lack of a serious criminal record, the fact that he has had no previous criminal incarceration and the fact that the government agreed to dismiss Count 9 which carried a mandatory minimum 120-month consecutive imprisonment.

6. The Court has considered the rationale of the government and the defendant in recommending this sentence and finds it to be justified under all of the circumstances of this case.

The sentence imposed is lengthy and little would be gained in terms of sentencing policies by incarcerating this defendant for a longer period of time.

7. The sentence imposed is sufficient, but it is not more than necessary, to punish the defendant for these offenses, to deter him and others from committing similar offenses, to promote respect for the law, to protect society, to take into account the rationale presented by the parties for their 11 (c) (1) (C) recommendation, which included the dismissal of Count 9, and to take into account the individual characteristics of the defendant.

MS. DAVIS: Your Honor, at this time I would move to dismiss Count 9 orally.

THE COURT: And that motion is granted.

MS. DAVIS: Thank you.

MR. KENNA: If I might, your Honor, taking into account the fact that Mr. Negron's family is totally here in New Hampshire at this point in time, I would also ask the Court, if you would, to recommend to the BOP that if possible his incarceration could be spent here in New Hampshire.

MS. DAVIS: No objection, your Honor.

THE COURT: All right. The Court will make that recommendation – –

MR. KENNA: Thank you, your Honor.

THE COURT: – – that he be assigned to the facility in Berlin. That's merely a recommendation. It's up to the Bureau of Prisons as to what the ultimate assignment will be.

MR. KENNA: We understand that, your Honor.

THE COURT: All right. The Court will be in recess.

MR. KENNA: Thank you, your Honor.

(Conclusion of hearing at 10:25 a. m.)

CERTIFICATE

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 3-27-17

/s/ Susan M. Bateman
Susan M. Bateman, LCR, RPR, CRR
LICENSED COURT REPORTER, NO. 34
STATE OF NEW HAMPSHIRE

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	)	Case Number: 12-cr-110-01-JD
v.	)	Bruce Kenna, Esq.
RAYMOND NEGRON	)	Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☒ pleaded guilty to counts: 1s – 8s of the Superseding Indictment.

☐ pleaded nolo contendere to counts(s) ___ which was accepted by the court.

☐ was found guilty on count(s) ___ after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)

See next

page.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _ and is discharged as to such count(s).

☒ Counts dismissed on motion of the United States: 9s of the Superseding Indictment.

☒ Counts dismissed: Original Indictment filed August 22, 2012.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

October 10, 2013
Date of Imposition of Judgment

/s/ Joseph A. DiClerico, Jr.
Signature of Judicial Officer

Joseph A. DiClerico, Jr.
United States District Judge
Name & Title of Judicial Officer

October 10, 2013
Date

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 841(a)(1)	Distribution of a Controlled Substance - Oxycodone	January 11, 2012	1s-3s
21 USC § 841(a)(1)	Distribution of a Controlled Substance -	March 12, 2012	4s
21 USC § 841(a)(1)	Distribution of a Controlled Substance - Oxycodone and Cocaine	March 20, 2012	5s
18 USC § 922(d)(1)	Sale of a Firearm to a Prohibited	December 13,	6s
26 USC §§ 5861(d), 5841, 5871	Person Possession of an Unregistered Firearm	March 20, 2012	7s
18 USC § 922(k)	Possession of a Firearm with an Obliterated Serial Number	March 20, 2012	8s

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 144 months.

Imprisonment term of 144 months on each of Counts 1s through 5s; 120 months on Counts 6s and 7s; and, 60 months on Count 8s, all such terms to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be designated to the facility in Berlin, NH in order to be close to his family.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ on ___ at ___.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before ___ on ___.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHALL

By: _____
Deputy U.S. Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

Supervised Release term of 3 years on each of Counts 1s through 8s, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Pursuant to 42 U.S.C. § 14135a, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the U.S. Probation Office.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 72 drug tests per year of supervision.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without permission of the court or probation officer;

2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

In addition, the defendant shall comply with the following special conditions:

As directed by the probation officer, the defendant shall participate in a program approved by the United States Probation Office for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse. The defendant shall also abstain from the use of alcoholic beverages and/or all other intoxicants during and after the course of treatment. The defendant shall pay for the cost of treatment to the extent he is able as determined by the probation officer.

The defendant shall submit his person, residence, office, or vehicle to a search conducted by a U.S. Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion that contraband or evidence of a violation of a condition of release may exist; failure to submit to a search may be grounds for revocation; the defendant shall wam any other residents that the premises may be subject to searches pursuant to this condition.

Upon a finding of a violation of probation or supervised release, I understand that the court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant	Date
U.S. Probation Officer/ Designated Witness	Date

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$800.00		

☐ The determination of restitution is deferred until . An Amended Judgment in a Criminal Case (AO 245C) will be after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of Pymnt
Totals:	$	0.00	$0.00

☐ If applicable, restitution amount ordered pursuant to plea agreement.

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f).

All of the payment options 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ The interest requirement is waived for the

☐ fine ☐ restitution

☐ The interest requirement for the

☐ fine and/or

☐ restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $800.00 due immediately.

☐ not later than _, or

☐ in accordance with ☐ C, ☐ D, or ☐ E below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or

C ☐ Payment in installments of $ over a period of ___, to commence ___ days after release from imprisonment to a supervision; or

D ☐ Within thirty days of the commencement of supervision, payments shall be made in equal monthly $ during the period of supervised release, and thereafter.

E ☐ Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary payments are to be made to Clerk, U.S. District Court, 55 Pleasant Street, Room 110, Concord, NH 03301. Payments shall be in cash or in a bank check or money order made payable to Clerk, U.S. District Court. Personal checks are not accepted.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary

penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made payable to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name	Case Number	Joint and Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Defendant shall forfeit to the United States his interest in the property identified in the charging document.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	)	
v.	)	1:12-cr-110-01-JD
RAYMOND NEGRON	)	

UNITED STATES' OBJECTION TO DEFENDANT'S REQUEST FOR A SENTENCING REDUCTION

Invoking 18 U.S.C. § 3582(c), the defendant seeks a reduction in his sentence based on the recent retroactive amendment to the Sentencing Guidelines for drug offenses. See Amendment 782. The defendant was sentenced to 144 months based on a binding stipulation contained in his plea agreement. Fed. R. Crim. P. 11(c)(1) (C). The defendant is not eligible for relief because his sentence was based on the stipulation in his C-plea agreement, not the advisory guideline range, and there is nothing within the plea agreement indicating that the 144 month stipulation was intended to be based on the guideline range.

To obtain relief from a retroactive change to the guidelines, the sentence originally imposed must have been "based on" the guidelines. 18 U.S.C.

§ 3582(c)(2). In *Freeman v. United States*, 131 S. Ct. 2685 (2011), the United States Supreme Court considered when, if ever, a defendant could obtain relief under § 3582(c) based on a retroactive guideline amendment, when the defendant had been sentencing initially pursuant to a binding stipulation contained in a Rule 11(c)(1)(C) plea agreement. The Court split three ways -- four justices said that a defendant who was sentenced pursuant to C-plea is always eligible for relief, four justices said that such a defendant is never eligible for relief, and Justice Sotomayor said that relief is available only in situations where the face of the C-plea agreement makes clear that the advisory guideline range was used to establish the defendant's stipulated sentence as set forth in the Agreement.

In *United States v. Rivera-Martinez*, 665 F.3d 344, 348 (1st Cir. 2011), the First Circuit held that Justice Sotomayor's opinion set forth the controlling law. Therefore, in order for a defendant to be eligible for a sentencing reduction, "the four corners of the plea agreement" must allow the court to identify with precision the applicable guideline range by containing stipulations as to the total offense level and criminal history. Id.

The *Rivera-Martinez* Court held that a defendant was ineligible where the C-plea agreement contained a stipulation as to the total offense level and months of imprisonment but no stipulation as to the criminal history category. 665 F.3d at 349. Because the criminal history integer was absent from the face of the plea agreement, the court held that the standard for relief established by Justice Sotomayor's opinion had not been met.

Here, there is even less to work with than in *Rivera-Martinez*. The "four corners" of the agreement contain only a stipulated sentence to 144 months; there is absolutely nothing tying this stipulated sentence to an advisory guideline range.

The defendant raises several arguments but none of them meet the requirement of *Rivera-Martinez* that the applicable guideline range is discernible from the text of the plea agreement. In this regard, the defendant says that government's position wrongly "considers only the barebones written agreement entered into at the time of the plea and ignores several complex situations and obvious agreements between the parties." The defendant's argument of course ignores the entire thrust of *Rivera-Martinez*; it is the words of the plea agreement that control. As the Court of Appeals observed, "the proper focus is neither the guideline calculations that the judge may perform before deciding whether to accept the agreement nor the "mere fact that the parties ... may have considered the Guidelines in the course of their negotiations. Rather, it is the terms contained within the four corners of the plea agreement that matter."[1] *Rivera-*

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[1] The defendant says that the offense conduct in the plea agreement was somehow a guideline stipulation. That is absurd. The offense conduct section includes those facts that the defendant is willing to agree to; they do however limits probation from uncovering more facts that would be included in calculating the guideline range. There was absolutely no stipulation to the application of any guideline factor within the plea agreement.

Martinez, 665 F.3d at 349. In short, the defendant's guideline range cannot be determined from the terms of the plea agreement. That fact makes him ineligible for a sentencing reduction under binding First Circuit precedent.

For these reasons, this Court should deny the defendant's request for a hearing and rules that he is not entitled to a sentencing reduction under 18 U.S.C. § 3582(c).

Dated: July 1, 2015 Respectfully submitted,

Donald Feith
Action United States Attorney

By: /s/ Seth R. Aframe
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent electronically by ECF to Bruce Kenna, counsel for defendant.

/s/ Seth R. Aframe
Seth R. Aframe, AUSA