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# Amendment 706 to the U.S. Sentencing Guidelines: Not All It Was Cracked up to Be

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## Issues In The Third Circuit

### AMENDMENT 706 TO THE U.S. SENTENCING GUIDELINES: NOT ALL IT WAS CRACKED UP TO BE

#### I. INTRODUCTION

It may seem draconian, but not very long ago someone caught with a teaspoon of crack cocaine could receive the same mandatory five-year prison sentence as a person caught with two cups of powder cocaine.<sup>1</sup> After receiving complaints from multiple organizations, the United States Sentencing Commission sought to correct this unwarranted disparity and, on November 1, 2007, passed Amendment 706 (the Amendment), which modified the base offense levels applicable to crack cocaine offenses.<sup>2</sup> On March 3, 2008, the Sentencing Commission declared the Amendment retroactive.<sup>3</sup> In so doing, the Commission opened the door to an estimated 19,500 prisoners who could seek reduced sentences.<sup>4</sup> Nevertheless, while this Amendment prompted thousands of prisoners to seek resentencing,

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1. See FAMILIES AGAINST MANDATORY MINIMUMS, CRACK COCAINE SENTENCING REFORM: A MODEST STEP IN THE RIGHT DIRECTION 1 (2007) [hereinafter CRACK COCAINE SENTENCING REFORM: A MODEST STEP IN THE RIGHT DIRECTION], [http://www.famm.org/Repository/Files/Handout\\_for\\_retroactivity\\_vote\\_\\_2\\_%5B1%5D.pdf](http://www.famm.org/Repository/Files/Handout_for_retroactivity_vote__2_%5B1%5D.pdf) (explaining why U.S. Sentencing Commission decided to reduce guideline range); see also Harlan J. Protass, *Crack Sentencing Is Wack: But a Fix May Finally Be on the Way*, SLATE (Sept. 28, 2007, 1:07 PM), <http://www.slate.com/id/2174860/> (detailing disparity that exists between length of sentences for crack cocaine and powder cocaine).

2. See U.S. SENTENCING GUIDELINES MANUAL app. C, Amendment 706 (Nov. 1, 2007) (amending base offense levels for crack cocaine offenses). See also JANET HINTON, CRACK RETROACTIVITY AMENDMENT CASE LAW 1 (2009), [http://www.fed.org/pdf\\_lib/Hinton%20crack%20update%208\\_09%20revision2.pdf](http://www.fed.org/pdf_lib/Hinton%20crack%20update%208_09%20revision2.pdf) (listing date Amendment first took effect).

3. See *id.* at 1 (listing date that Sentencing Commission made Amendment retroactive).

4. See Memorandum from Glenn Schmitt et al., U.S. Sentencing Comm'n, to Hon. Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n, 1, 5-6 (Oct. 3, 2007), available at [http://www.ussc.gov/general/Impact\\_Analysis\\_20071003\\_3b.pdf](http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf) (estimating number of potential offenders who would be eligible to seek reduced sentence); see also CRACK COCAINE SENTENCING REFORM: A MODEST STEP IN THE RIGHT DIRECTION, *supra* note 1, at 2 (noting that according to Commission's analysis 19,500 prisoners over course of thirty years could be affected).

current data suggests that one-third of such motions have been denied for a variety of reasons including: (1) the offense did not involve crack cocaine; (2) the offense was not eligible under U.S.S.G. § 1B1.10 (the Commission's policy statement); (3) the motion was denied on the merits; or (4) the court provided no explicit reason.<sup>5</sup>

In *United States v. Jane Doe*,<sup>6</sup> the Third Circuit denied a motion for resentencing filed by John and Jane Doe, who were subject to a mandatory minimum sentence but received a downward departure because of their substantial assistance to the government.<sup>7</sup> The court relied on an earlier Third Circuit case that involved a downward departure from a mandatory minimum sentence, *United States v. Cordero*,<sup>8</sup> to help guide its analysis of the resentencing statute.<sup>9</sup> The majority relied heavily on *Cordero* in determining that the defendants' offenses were not eligible under the policy statement.<sup>10</sup> Notably, the majority's reasoning differed from the approach used by other circuits, such as the Second Circuit's approach in *United States v. McGee*.<sup>11</sup> In *McGee*, the court made a point to avoid undermining the purpose of the Amendment by reading the resentencing statute, 18 U.S.C. § 3582(c)(2), formalistically.<sup>12</sup>

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5. See U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT 1, 4 (2009) (identifying percentage of motions that have been granted and denied by district courts as of November 17, 2009). It is important to note that this data could change as the Sentencing Commission receives more information. See *id.* at 3 (explaining that these figures only represent cases that have been decided and reported to Sentencing Commission as of November 17, 2009). Specifically, there still are numerous judicial districts that have motions that are being challenged and reviewed. See *id.* (cautioning that there are currently motions that are being reviewed or awaiting review). Depending on the outcome of these motions, the percentages of denied motions could be higher or lower than the current figures. See *id.* (explaining that these numbers will change based on cases decided and reported after report was created). Nevertheless, of the 23,155 motions that have been filed in the district courts, 15,359 have been granted and 7,796 have been denied. See *id.* at 4 (listing geographical distribution of outcomes for sentencing reconsideration subsequent to crack cocaine Amendment).

6. 564 F.3d 305 (3d Cir. 2009).

7. See *id.* at 315 (concluding that Amendment did not lower appellant's mandatory minimum sentences and, therefore, failed to satisfy second element of 18 U.S.C. § 3582(c)(2)).

8. 313 F.3d 161 (3d Cir. 2002).

9. See *Doe*, 564 F.3d at 311 (stating that "although *Cordero* addresses the appropriate starting point for a downward departure rather than the interpretation of § 3582(c)(2)," *Cordero* is still instructive).

10. See *id.* at 316 (Fuentes, J., concurring) (suggesting that *Cordero* addresses different stage of sentencing than substantial departure motions and, therefore, might not be applicable).

11. See *United States v. McGee*, 553 F.3d 225, 230 (2d Cir. 2009) (holding that individual designated as career offender, but ultimately sentenced based on initial guidelines, should be eligible for resentencing under 18 U.S.C. § 3582(c)(2)).

12. See *id.* at 229-30 (pointing out that, contrary to Amendment's intent, defendants in instant case were clearly sentenced pursuant to crack cocaine guidelines and disadvantaged by 100-to-1 ratio).



This Casebrief analyzes the class of individuals affected by the Third Circuit's ruling in *Doe* and compares the court's reasoning with the rationales advanced by other circuits.<sup>13</sup> Part II addresses the necessity for the Amendment and the issues that the circuit courts have encountered when applying it in conjunction with the resentencing statute.<sup>14</sup> Part III discusses the factual background of *Doe* and the Third Circuit's analysis.<sup>15</sup> Part IV analyzes *Doe*'s future impact on litigants in the Third Circuit and contrasts the court's reasoning with other circuits.<sup>16</sup> Part V concludes by suggesting that the Sentencing Commission should issue a clarification to the Amendment to help ensure that the purpose that motivated its enactment does not get lost in translation.<sup>17</sup>

## II. APPLYING AMENDMENT 706: THE CIRCUITS AGREE TO DISAGREE

### A. *Retroactive Amendments: Power to Change the Past*

The Sentencing Commission is given authority to make amendments to the sentencing guidelines pursuant to 28 U.S.C. § 994(o).<sup>18</sup> In addition, 28 U.S.C. § 994(u) provides that the Sentencing Commission retains the authority to determine whether a sentencing reduction should be applied retroactively.<sup>19</sup> After an amendment is made retroactive, qualified prisoners are allowed to file motions for reduced sentences pursuant to the resentencing statute, which has two main requirements: (1) a court cannot modify a term of imprisonment unless the term was "based on" a

13. For a discussion of *Doe*'s impact on crack cocaine litigation and the individuals affected, see *infra* notes 124-45 and accompanying text.

14. For a historical analysis of recent crack cocaine litigation since the Amendment's enactment in 2007, see *infra* notes 36-78 and accompanying text.

15. For the factual background of *Doe*, see *infra* notes 79-93 and accompanying text.

16. For an analysis of the Third Circuit's opinion in *Doe*, see *infra* notes 94-123 and accompanying text.

17. For an explanation of the unusual outcomes that can result from the Third Circuit's holding and a call to the Sentencing Commission to provide greater clarification, see *infra* notes 146-50 and accompanying text.

18. See 28 U.S.C. § 994(o) (2006) (giving authority to Sentencing Commission to make amendments to guidelines).

19. See *id.* § 994(u) (giving Sentencing Commission authority to lower sentencing ranges and to determine whether reduction should be applied retroactively). Specifically, 28 U.S.C. § 994(u) states that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." See *id.* (requiring Sentencing Commission to specify how prisoners' sentences will be affected any time it reduces guidelines applicable to particular offenses or categories of offenses). Interestingly, the Sentencing Commission did not come into existence until 1984 when Congress created it in the Sentencing Reform Act. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1, 4 (1995) [hereinafter COCAINE AND FEDERAL SENTENCING POLICY 1995], available at <http://www.ussc.gov/crack/execsum.pdf> (explaining Sentencing Commission's origin).

sentencing range that has been subsequently lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o); and (2) the court may grant a reduction only after considering the list of factors in 18 U.S.C. § 3553(a) and ascertaining whether the reduction is consistent with the applicable policy statement issued by the Sentencing Commission.<sup>20</sup>

As noted, the second prong of the resentencing statute requires that any reduction be consistent with the Sentencing Commission's policy statement.<sup>21</sup> This policy statement is found in the United States Sentencing Guidelines and has important exclusions and limitations that can affect a defendant's ability to satisfy the second prong.<sup>22</sup> As a prerequisite, the policy statement mandates that an amendment must be listed as a covered amendment in subsection (c) of the statement in order to be eligible for modification.<sup>23</sup> Only listed amendments may be applied retroactively.<sup>24</sup> The policy statement also provides courts with guidance as to the amount of reduction that should be allowed for prisoners seeking a sentence modification.<sup>25</sup> It also instructs that if the other requirements of the resentencing statute are met, the judge should consider the factors listed

20. See 18 U.S.C. § 3582(c)(2) (2006) (listing requirements judges are mandated to meet if they modify term of imprisonment).

21. See *id.* (requiring that reduction is consistent with policy statement of Sentencing Commission).

22. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2) (2008) (listing exclusions and limitations that apply to reductions of terms of imprisonment).

23. See *id.* § 1B1.10(a)(2) (requiring that amendment incorporated in subsection (c) be consistent with the Sentencing Commission's policy statement).

24. See *id.* § 1B1.10(c) (listing amendments that Sentencing Commission decided to include in policy statement). Currently, the covered amendments are: 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, and 715. See *id.* (reciting amendments covered by policy statement). Arguably, the Commission's policy statement approach is its way of acknowledging that a reduced sentence is sufficient to achieve the prior goals of sentencing. See Schmitt et al., *supra* note 4, at 3 (stating that inclusion of Amendment in policy statement reflects Sentencing Commission's policy determination that reduced guideline ranges are sufficient to achieve purposes of sentencing and may be appropriate for previously qualified defendants). The policy statement does acknowledge that determining a reduced guideline sentencing range should be applied retroactively, but does not: (1) affect the legitimacy of a previously imposed sentence; (2) affect any other component of a prisoner's sentence; or (3) entitle a prisoner to a reduction as a matter of right. See *id.* (qualifying implications of Amendment being listed in policy statement).

25. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(1) (providing courts with guidance as to how they should determine appropriate reduction of previous sentences). The Manual states:

In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced . . . .

*Id.*



in 18 U.S.C. § 3553(a) before deciding whether to modify the term of imprisonment.<sup>26</sup>

### B. *Rewriting the Rules*

The crack cocaine disparity began with the enactment of the Anti-Drug Abuse Act of 1986.<sup>27</sup> At that time, crack was a relatively new drug and Congress feared that it was far more dangerous than powder cocaine.<sup>28</sup> Nevertheless, as more information about crack cocaine became available, the Sentencing Commission started to believe that the punishments being issued in connection with crack cocaine offenses were too harsh and recommended that Congress revisit the sentencing guide-

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26. See 18 U.S.C. § 3582(a) (2006) (requiring judge to consider factors of Section 3553(a) to extent applicable before reducing term of imprisonment). These factors are required when the judge is deciding whether to reduce the term of imprisonment because the Sentencing Commission has lowered the sentencing guidelines and applied them retroactively. See *id.* § 3582(c) (2) (“[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment, after considering the factors set forth in [S]ection 3553(a) to the extent they are applicable . . . .”). Terms of imprisonment may be modified in other ways such as:

[I]n any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation of supervised release with or without the conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or  
(ii) the defendant is at least 70 years of age . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure . . . .

*Id.* § 3582(c)(1) (listing other ways to modify terms of imprisonment).

27. Pub. L. No. 99-570, 100 Stat. 3207 (1986). The stated purpose of the Act was

to strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of Federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.

*Id.* (explaining original purpose of Act).

28. See *Kimbrough v. United States*, 128 S. Ct. 558, 567 (2007) (outlining reasons why Congress found it necessary to create significantly higher penalties for crack cocaine as compared to powder cocaine). The end result was that an individual with fifty grams of crack would be punished the same as someone who was found with five thousand grams of powder cocaine. See *id.* (giving example of disparity between amounts of crack cocaine and powder cocaine that receive same amount of punishment).



lines.<sup>29</sup> In 2002, the Sentencing Commission went even further and stated that the disparity between crack cocaine and cocaine powder “fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.”<sup>30</sup> The Commission, relying on significant research, identified the problematic nature of the disparity and suggested a decrease of the current ratio to at least twenty-to-one.<sup>31</sup> Finally, in 2007,

29. See COCAINE AND FEDERAL SENTENCING POLICY 1995, *supra* note 19, at 4 (recommending that Congress should revisit 100-to-1 ratio and penalty structure).

30. See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 106 (2002) [hereinafter COCAINE AND FEDERAL SENTENCING POLICY 2002], available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf) (“After carefully considering all of the information currently available . . . the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.”). Crack cocaine and cocaine powder are two forms of the same drug. See COCAINE AND FEDERAL SENTENCING POLICY 1995, *supra* note 19, at 6 (explaining that crack cocaine and powder cocaine are two forms of same drug). Cocaine is a naturally occurring substance that is produced by reacting coca paste, derived from leaves of a coca plant, with hydrochloric acid. See *id.* (describing process of producing cocaine powder). Cocaine powder is considered a potent anesthetic and a powerful stimulant. See *id.* (explaining effect of cocaine powder). Crack cocaine is made using cocaine powder in a simple process that includes baking soda, water, and a stove or microwave. See *id.* (describing process of making crack cocaine). The psychotropic and physiological effects of crack cocaine are the same for crack cocaine and powder cocaine, with the only difference being the way each is administered. See *id.* at 7 (noting that difference between effects of two drugs depends on way drug administered). Crack cocaine can only be smoked, while powder cocaine can be snorted, ingested, or injected. See *id.* The psychotropic effects of a drug have more intensity the quicker the drug reaches the brain. See *id.* (explaining speed that drug reaches brain determines intensity of psychotropic effects). Crack cocaine allows the maximum psychotropic effects to occur as soon as one minute after smoking it and the effects can last up to thirty minutes. See *id.* (describing time needed for maximum effects of crack cocaine to occur and duration). Cocaine powder can differ depending on the use: (1) when injected, it can take up to four or more minutes for the effects to be felt and last for thirty minutes, or (2) when snorted, cocaine powder can take up to twenty minutes or more for the effects to materialize, however, the effects can last up to sixty minutes. See *id.* (noting length of time before effects are felt using both crack cocaine and cocaine powder and their relative durations). As of the Sentencing Commission’s 2002 report to Congress, the addictiveness of the drugs was thought to depend on the way it was administered. See COCAINE AND FEDERAL SENTENCING POLICY 2002, *supra*, at 19 (explaining that addictiveness can depend on way drug is administered). The Commission stressed that the properties of the two forms of cocaine are not what makes one inherently more addictive than the other, but rather whether the user smokes, injects, or snorts the drug. See *id.* (stating addictiveness is not dependent on properties of drugs but rather dependent on form user administers drug to themselves).

31. See *Kimbrough*, 128 S. Ct. at 568 (listing reasons why Sentencing Commission felt sentencing disparity was problematic). The main reasons relied upon by the Commission were: (1) the 100-to-1 ratio “rested on assumptions about ‘the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent data no longer support’”; (2) the results of the 100-to-1 ratio have not been consistent with the goal of punishing major drug traffickers more severely than low-level dealers;



after Congress failed to take any action pursuant to their recommendations, the Sentencing Commission adopted Amendment 706 without formal approval from Congress.<sup>32</sup>

The sentencing reduction the Commission implemented amounted to a two-level decrease to the base offense level associated with crack cocaine.<sup>33</sup> In practice, this reduction resulted in sentences for crack cocaine that were only two to five times longer than those for powder cocaine, a disparity more equivalent to the relative dangers of the two drugs.<sup>34</sup> The Amendment took effect on November 1, 2007 and was made retroactive on March 3, 2008.<sup>35</sup>

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and (3) the disparity was resulting in a public lack of confidence in the criminal justice system because the severity of the punishment was being mainly felt by African-Americans. *See id.* (detailing three reasons Commission relied upon to demonstrate that current disparity should be remedied). Regarding the harmfulness of crack cocaine, the Sentencing Commission found that it was associated with a significantly lower amount of trafficking-related violence than previously assumed when the guidelines were created in 1986. *See id.* (pointing out that Sentencing Commission noticed that crack cocaine was not involved in as much trafficking-related violence as previously assumed). Further, the attempt to punish high-level traffickers proved unsuccessful because such traffickers are able to supply cocaine to street drug dealers, who then subsequently convert the powder cocaine into crack cocaine. *See id.* (explaining why high-level traffickers have not been punished by Act as intended). Therefore, if the high-level trafficker gets caught with powder cocaine, he or she could receive a lower punishment than low-level street pushers because the small scale pusher is the one who converts it to crack cocaine. *See id.* (noting that often smaller scale street dealers actually convert the cocaine powder into crack cocaine). Notably, the vast majority of convicted smaller scale dealers are African-American—representing eighty-five percent of defendants convicted of crack offenses. *See id.* (providing data trends showing that sizable majority of crack cocaine convictions are against African-Americans). Nevertheless, this was the third time the Sentencing Commission had suggested to Congress a reduction was necessary, asking in 1995 for a reduction to 1-to-1, in 1997 suggesting 5-to-1, and in 2002 suggesting at least a reduction to 20-to-1. *See id.* at 569 (detailing previous suggestions made by Sentencing Commission to Congress with respect to lowering the disparity that exists).

32. *See id.* (noting that 2007 report was created like previous years but that Sentencing Commission decided to adopt proposed reduction in guidelines without Congressional approval).

33. *See id.* (explaining reduction in sentencing guidelines associated with crack cocaine).

34. *See id.* (estimating change in disparity between cocaine powder and crack cocaine guidelines after reduction in base level of offenses by Sentencing Commission). The Sentencing Commission meant for the Amendment to be a temporary fix and is still waiting for a more comprehensive solution from Congress. *See id.* (emphasizing that reduction in sentencing guidelines by Sentencing Commission is partial remedy but ultimately will require Congress to pass appropriate legislation).

35. *See* HINTON, *supra* note 2, at 1 (listing dates that Amendment was first made effective and when it first applied retroactively).



C. *Seeing the Same Thing from Different Angles*

Since the Sentencing Commission first made the Amendment effective, a variety of issues have arisen regarding its compatibility with the resentencing statute.<sup>36</sup> One specific area of contention involves its application to defendants who are classified as career offenders pursuant

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36. *See id.* at 2 (pointing out that there have been numerous issues surrounding Amendment and its enforceability under resentencing statute). In addition to issues surrounding career offenders and defendants subject to mandatory minimums, there has also been trouble with the Amendment's application to defendants sentenced pursuant to a binding plea agreement. *See id.* at 5 (explaining that circuits have disagreed over whether courts can resentence defendants who entered into binding plea agreements). There are two main areas of disagreement: (1) whether someone sentenced pursuant to a plea agreement can have a sentence "based on" the guidelines; and (2) whether the court is bound by a plea agreement prohibiting the agreement's alteration. *See id.* 5-6 (addressing reasoning courts have used when determining whether defendants sentenced pursuant to plea agreement are eligible or ineligible for resentencing). The former issue is derived from the resentencing statute's requirement that a court cannot modify a term of imprisonment unless it was "based on" a sentencing range that has been subsequently lowered. *See United States v. Sanchez*, 562 F.3d 275, 280-81 (3d Cir. 2009) (agreeing with three circuits that have already held sentences prescribed in binding plea agreements are not "based on" subsequently lowered sentencing ranges). This had led to confusion over whether a sentence issued pursuant to a plea agreement can be "based on" the guidelines rather than the actual plea agreement. *See id.* (addressing issue of whether sentence issued pursuant to plea agreement can be based on guidelines). The majority of circuits have held that a court is not allowed to alter a binding plea agreement in a resentencing proceeding. *See id.* at 282 (holding that sentence was based on plea agreement and not sentencing guidelines); *United States v. Scurllark*, 560 F.3d 839, 843 (8th Cir. 2009) (same); *United States v. Graham*, 304 Fed. App'x 686, 688 (10th Cir. 2008) (same); *United States v. Peveler*, 359 F.3d 369, 378-79 (6th Cir. 2004) (same); *United States v. Trujague*, 100 F.3d 869, 871 (10th Cir. 1996) (same). Nevertheless, the Fourth Circuit has disagreed, holding that even if a defendant is sentenced pursuant to a plea agreement, if it is clear the plea agreement was "based on" the guidelines, the defendant is eligible to seek a reduction under the sentencing statute. *See United States v. Dews*, 551 F.3d 204, 208-10 (4th Cir. 2008) (holding that where it is clear that guidelines played central role in sentencing defendant, that defendant can be eligible for resentencing pursuant to resentencing statute). In circuits that have not addressed the issue, the majority trend in the district courts has been that plea agreements are binding for the purposes of resentencing proceedings. *See, e.g., United States v. Johnson*, No. 05-40107-01-RDR, 2008 WL 4758581, at \*1 (D. Kan. Oct. 27, 2008) (holding plea agreements are binding for purposes of resentencing proceedings); *United States v. Bride*, No. CR04-5350 RBL, 2008 WL 2782688, at \*1 (W.D. Wash. July 14, 2008) (same); *United States v. Tindall*, No. 3:04cr00031-2, 2008 WL 2518546, at \*1 (W.D. Va. June 19, 2008) (same); *United States v. Arroyo*, No. 97 CR1146 (ILG), 2008 WL 2497430, at \*1 (E.D.N.Y. June 18, 2008) (same); *United States v. Grigsby*, 560 F. Supp. 2d 1066, 1066 (D. Colo. 2008) (same); *United States v. Clayborn*, No. 1:CR-05-51-01, 2008 WL 2229531, at \*1 n.2 (M.D. Pa. May 28, 2008) (same); *United States v. Gordon*, No. CR-97-24-FHS, 2008 WL 901911, at \*1 (E.D. Okla. Mar. 31, 2008) (same); *see also United States v. Bundy*, 613 F. Supp. 2d 35, 37-38 (D. D.C. May 8, 2009) (disagreeing with *Dews* and holding that "a sentence agreed to in a Rule 11(c)(1)(C) agreement is not a sentence 'based on a sentencing range' that has been set by the Sentencing Commission").



to U.S.S.G. § 4B1.1.<sup>37</sup> When a defendant has been sentenced within the career offender guideline range and not granted a downward departure, courts have uniformly held that the defendant is not eligible for resentencing.<sup>38</sup> Courts reason that they lack the authority to grant reductions pursuant to the resentencing statute because the Amendment does not reduce the career offender guidelines that apply to the defendant.<sup>39</sup>

On the other hand, defendants who qualify for the career offender guidelines but receive departures from them have proved more successful in seeking reduced sentences.<sup>40</sup> A career offender can receive a downward departure under U.S.S.G. § 4A1.3(b) when the judge concludes that the career offender guidelines over-represent the seriousness of the defendant's criminal history.<sup>41</sup> Again, the issue courts have struggled with is the resentencing statute's requirement that the defendant be sentenced to a term of imprisonment "based on a sentencing range that has subsequently

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37. See HINTON, *supra* note 2, at 7 (addressing issue of whether defendants sentenced pursuant to career offender guideline ranges are eligible for sentence reductions). The guidelines describe a defendant as a career offender if:

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (defining career offender).

38. See, e.g., *United States v. McGee*, 553 F.3d 225, 227 (2d Cir. 2009) (holding career offenders not eligible for reduced sentences when they do not receive downward departures of any kind); *United States v. Forman*, 553 F.3d 585 (7th Cir. 2009) (same); *United States v. Sharkey*, 543 F.3d 1236, 1237 (10th Cir. 2008) (same); *United States v. Moore*, 541 F.3d 1323, 1330 (11th Cir. 2008) (same); *United States v. Thompson*, 290 F. App'x 519, 520 (3d Cir. 2008) (same); *United States v. Caraballo*, 552 F.3d 6, 10 (1st Cir. 2008) (same); *United States v. Tyler*, Fed. Appx. 265 (4th Cir. 2008) (same); *United States v. Thomas*, 524 F.3d 889, 890 (8th Cir. 2008) (same); *United States v. Jackson*, CA No. 03-793, 2009 WL 101849 (E.D. Pa. Jan. 14, 2009) (same); *United States v. Perdue*, No. 1:99-cr-00334, 2008 WL 4404278, at \*3 (N.D. Ohio Sept 23, 2008) (same); see also HINTON *supra* note 2, at 7 (explaining consensus among courts that defendants sentenced pursuant to career offender guideline ranges are not eligible for resentencing).

39. See HINTON, *supra* note 2, at 7 (explaining courts have not been willing to resentence defendants sentenced pursuant to career offender guideline ranges under resentencing statute because career offender guidelines were not reduced).

40. See *id.* (stating relief has been granted to defendants who received departures from career offender guideline ranges).

41. See *id.* (identifying one departure that career offenders can receive that has resulted in courts granting sentence reductions under resentencing statute). The U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 states that "if reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." See U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (explaining appropriate conditions for judges to grant downward departures because of career offender classification over-representing defendant's criminal history).



been lowered by the Sentencing Commission.”<sup>42</sup> When trying to determine whether a sentence is “based on a sentencing range,” courts have used a variety of tests, including: whether the defendant was sentenced “pursuant” to the subsequently lowered sentencing range; if the district court relied upon the sentencing range when sentencing the defendant; whether the range “played a role” in the guideline calculation; and whether the defendant’s sentence was “influenced by and based in part on” a subsequently lowered sentencing range.<sup>43</sup> Nevertheless, when a career offender has been granted a departure pursuant to U.S.S.G. § 4A1.3(b), the majority of courts have held that the defendant is eligible for a sentence reduction.<sup>44</sup> Courts have reached this conclusion by determining that their sentences were “based on” a sentencing range that has been subsequently lowered because the final sentences were ultimately based on and influenced by the crack cocaine guidelines.<sup>45</sup>

Career offenders, however, have not seen as much success when they receive downward departures for providing substantial assistance to the government.<sup>46</sup> The main hurdle these offenders face is that the sentenc-

42. See HINTON, *supra* note 2, at 7 (addressing resentencing statute’s requirement that defendant be sentenced pursuant to term of imprisonment based on sentencing range subsequently lowered by Sentencing Commission).

43. See *United States v. Mullanix*, 99 F.3d 323, 324 (9th Cir. 1996) (stating that sentences are based on sentencing ranges if defendant was sentenced pursuant to subsequently lowered sentencing range); see also *Moore*, 541 F.3d at 1330 (concluding there was no basis to determine district court relied upon sentencing range when determining defendant’s sentence); *United States v. Herron*, No. 3:93cr167-02-MU, 2008 WL 2986804, at \*1 (W.D.N.C. July 31, 2008) (determining whether sentence imposed was influenced by or based in part on subsequently lowered sentence range); *United States v. Poindexter*, 550 F. Supp. 2d 578, 581 (E.D. Pa. 2008) (analyzing whether recommended range played role in guide calculation); HINTON, *supra* note 2, at 7 (describing means used by courts to determine whether defendants’ sentences were based on subsequently lowered guideline ranges).

44. See *United States v. McGee*, 553 F.3d 225, 229 (2d Cir. 2009) (holding career offenders may be eligible for reduced sentences when they were granted downward departures because career offender classification over-represented their criminal history); *Moore*, 541 F.3d at 1329-30 (same); *United States v. Willis*, No. CR 02-120-RE, 2008 WL 4793688 (D. Or. Oct. 30, 2008) (same); *United States v. Collier*, No. 4:05-CR-313 CAS, 2008 WL 4204976, at \*3 (E.D. Mo. Sept. 5, 2008) (same); *United States v. Ragland*, 568 F. Supp. 2d 19, 20 (D. D.C. 2008) (same); *United States v. Clark*, Crim. No. 00-037, 2008 WL 2705215, at \*1 (W.D. Pa. July 7, 2008) (same); *United States v. Cornish*, Crim. No. 05-337 (SRC), 2008 U.S. Dist. LEXIS 50577, at \*7-8 (D. N.J. June 25, 2008) (same); *Poindexter*, 550 F. Supp. 2d at 580-81 (same); *United States v. Nigatu*, Crim. No. 00-18 (PAM) 2008 WL 926561 (D. Minn. Apr. 7, 2008) (same); cf. *United States v. Boyd*, 2008 WL 2537139, at \*3 (W.D. Pa. June 24, 2008) (suggesting reduction would be warranted if § 4A1.3 departure to § 2D1.1 range had been granted).

45. See *McGee*, 553 F.3d at 227 (concluding defendant was sentenced based on subsequently lowered guideline range because it was apparent district court premised sentence on crack cocaine guidelines).

46. See *United States v. Williams*, 551 F.3d 182, 186-87 (2d Cir. 2009) (explaining that defendants who receive downward departures from career offender guidelines are not eligible for resentencing reductions because courts are not allowed to consider original crack cocaine guidelines when awarding downward departures).



ing jurisprudence in most circuits does not allow judges to consider the original crack cocaine guidelines when granting such downward departures.<sup>47</sup> Instead, when granting this type of departure, the majority of circuits only allow the judge to consider factors related to the defendant's substantial assistance to the government.<sup>48</sup> This restriction has prevented defendants from being able to show that their sentences were "based on" the crack cocaine guidelines in any way, putting them in the same category as career offenders who receive no downward departure at all.<sup>49</sup>

Moreover, another class of defendants who have experienced difficulties seeking reduced sentences are defendants who are subject to mandatory minimum sentences but received downward departures for providing substantial assistance to the government.<sup>50</sup> A defendant can be subject to a mandatory minimum sentence because of previous convictions.<sup>51</sup> A court is required to apply the mandatory minimum sentence if it is greater than the maximum applicable sentence from the defendant's applicable crack cocaine offenses.<sup>52</sup> The government can file a motion to depart from a mandatory minimum sentence if a defendant has provided the government with substantial assistance, just as they do with career of-

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for career offenders); *Moore*, 541 F.3d at 1330 (stating district court provided no indication that defendant's sentence was based on crack cocaine guidelines rather than career offender guidelines).

47. *See Williams*, 551 F.3d at 186-87 (explaining courts are not allowed to consider original crack cocaine guidelines when granting departures from career offender guidelines).

48. *See United States v. Doe*, 564 F.3d 305, 315 n.1 (3d Cir. 2009) (Fuentes, J., concurring) (explaining that all other circuits that have addressed issue concluded that maximum extent of substantial assistance departure may be based only on defendant's substantial assistance).

49. *See HINTON*, *supra* note 2, at 8 (explaining reason courts have felt differently about granting sentence reductions for career offenders who received downward departures for substantial assistance). In most circuits, this restriction characterizes the difference between the two departures and explains why courts have been reluctant to grant departures when the defendants cannot show that their sentence was ultimately based on the original crack cocaine guidelines. *See id.* at 9 (explaining that difference between two downward departures is judge's ability to base defendant's ultimate sentence on original crack cocaine guidelines rather than career offender guidelines).

50. *See id.* (stating circuits have reached different conclusions regarding eligibility of defendants subject to statutory mandatory minimums to receive downward departures due to substantial assistance).

51. *See Williams*, 551 F.3d at 183-84 (explaining defendant was subject to mandatory minimum sentence because of previous drug conviction).

52. *See U.S. SENTENCING GUIDELINES MANUAL* § 5G1.1(b) (2007) (detailing process courts should use when there are conflicting guideline ranges). USSG § 5G1.1(b) specifically states that "where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." *See id.* (explaining procedure when statutory mandatory minimum conflicts with applicable guideline range).



fenders.<sup>53</sup> Additionally, courts are allowed to grant downward departures below the crack cocaine guideline range after considering a list of factors.<sup>54</sup> While the list itself states it is not exhaustive, the majority of circuits have held that a judge can base the amount of the court's departure only on the defendant's substantial assistance.<sup>55</sup> Conversely, the Third Circuit allows judges to consider the seriousness of a defendant's offense

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53. See 18 U.S.C. § 3553(e) (2006) (authorizing courts to depart from mandatory minimum sentences for substantial assistance provided by defendant to government). The statute states:

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

*Id.*

54. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009) (providing authorization for judges to grant departures from regular guidelines when defendants provide substantial assistance). The Manual states:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

*Id.* (explaining procedure for granting substantial assistance).

55. See *United States v. Mariano*, 983 F.2d 1150, 1156 (1st Cir. 1993) ("As a basis for departing, a court may consider mitigating factors only to the extent that they can fairly be said to touch upon the degree, efficacy, timeliness, and circumstances of a defendant's cooperation."); see also *United States v. Davis*, 407 F.3d 1269, 1271 (11th Cir. 2005) ("While the sentencing court had discretion under § 5K1.1 in deciding whether to depart from the guidelines and the extent of that departure, it did not have the discretion to consider factors unrelated to the nature and type of [the defendant's] assistance."); *United States v. Bullard*, 390 F.3d 413, 416 (6th Cir. 2004) (discussing court's limited authority for downward sentencing departure); *United States v. Auld*, 321 F.3d 861, 867 (9th Cir. 2003) (same); *United States v. Pearce*, 191 F.3d 488, 492 (4th Cir. 1999) (same); *United States v. Campbell*, 995 F.2d 173, 175 (10th Cir. 1993) (same); see also *United States v. Thomas*, 11 F.3d 732, 737 (7th Cir. 1993) ("[A] downward departure from the statutory minimum sentence for any purpose other than that provided in U.S.S.G. § 5K1.1 would conflict with and therefore violate the statute [Section 3553(e)].").

and, therefore, the original guidelines, when determining the extent of its substantial assistance.<sup>56</sup>

Nevertheless, the circuit courts remain divided on the question of whether to allow a sentence reduction in these circumstances.<sup>57</sup> The Second Circuit's line of cases in this area addresses the key problems with downward departures, the differences between career offender and mandatory minimum classifications, beginning with *United States v. Williams*.<sup>58</sup> In *Williams*, the defendant's crack cocaine offenses subjected him to a sentencing range of 97 to 127 months; however, due to his previous criminal history there was a mandatory minimum sentence of 240 months.<sup>59</sup> Upon the government's motion, the district court sentenced the defendant to a 100 month imprisonment, only half of which was associated with the crack cocaine offenses.<sup>60</sup> After the district court denied the defendant's motion for resentencing, the Second Circuit affirmed; however, the court clarified its reasoning, explaining "[t]here [was] no evidence that the Guidelines range calculated under U.S.S.G. § 2D1.1(c) played any role in the district court's determination of his sentence, and the district court so found."<sup>61</sup> This statement left open the possibility for future defendants to show that the judge considered the crack cocaine guidelines when granting the substantial assistance departure.<sup>62</sup>

Later, in *United States v. McGee*,<sup>63</sup> the Second Circuit held that when a district court departs from the career offender guidelines and bases that departure on the crack cocaine guidelines, the defendant should be per-

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56. See *United States v. Carey*, 382 F.3d 387, 391 (3d Cir. 2004) ("On occasion, and despite the terms of a government recommendation, factors other than those listed in 5K1.1 have been considered in deciding the extent of a departure."); *United States v. Casiano*, 113 F.3d 420, 431 (3d Cir. 1997) (finding no error in law where court took into consideration seriousness of offense when determining extent of departure).

57. See HINTON, *supra* note 2, at 9 (stating courts have reached different conclusions in determining whether to allow reductions).

58. See, e.g., *United States v. Williams*, 551 F.3d 182, 184 (2d Cir. 2009) (suggesting for first time in Second Circuit that it would be possible to grant reduction in these situations).

59. See *id.* at 183-84 (detailing differences between crack cocaine guidelines and mandatory minimum guidelines that applied to defendant). In addition, the defendant was also subject to a sixty-month sentence due to a firearms charge. See *id.* at 184 (explaining additional charge against defendant).

60. See *id.* (detailing sentence district court gave defendant after government made motion for reduction based on substantial assistance). Fifty months of the sentence was for the crack cocaine offenses and the other half was for the firearms charges against the defendant. See *id.* (explaining sentence).

61. See *id.* (emphasizing that there was no evidence of any consideration of original guidelines range when determining defendant's sentence).

62. See *United States v. McGee*, 553 F.3d 225, 228-29 (2d Cir. 2009) ("Thus, we allowed that a defendant whose post-departure sentence was in fact determined by the crack cocaine guidelines might be eligible for a reduced sentence.").

63. 553 F.3d 225 (2d Cir. 2009).



mitted to seek resentencing.<sup>64</sup> In *McGee*, the defendant was originally designated as a career offender, but the district court ultimately based its sentence on the crack cocaine guidelines because the judge concluded that the “career offender classification overrepresented his criminal history.”<sup>65</sup> The court pointed out, however, that the same reasoning may not apply to defendants who were subject to a mandatory minimum and received downward departures.<sup>66</sup> The critical difference was that downward departures granted to defendants with mandatory minimum sentences can only be “based on” the defendants’ substantial assistance to the government.<sup>67</sup>

Similarly, the Fourth Circuit also recently addressed whether resentencing should be permitted for defendants who were granted substantial assistance departures from mandatory minimums in *United States v. Hood*.<sup>68</sup> In *Hood*, the court considered two appeals from a district court that denied both defendants’ motions for resentencing.<sup>69</sup> The defendants were guilty of trafficking crack cocaine and were subject to a mandatory minimum sentence of 240 months.<sup>70</sup> The district court reduced the sentences of both defendants for substantial assistance provided to the government, lowering the sentences to 100 and 108 months, respectively.<sup>71</sup> The Fourth Circuit ultimately denied the defendants’ motions and based its reasoning on the fact that: (1) a district court is not authorized to consider the original crack cocaine guidelines when granting the downward departure if the defendant is subject to a mandatory minimum; and (2) granting a defendant a substantial assistance departure is still based on the mandatory min-

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64. *See id.* at 230 (concluding that defendants who fell under career offender guidelines but received sentences ultimately based on crack cocaine guidelines were eligible for resentencing).

65. *See id.* at 226 (noting court departed from defendant’s career offender classification to sentence him based on applicable crack cocaine guidelines). The judge used the actual crack cocaine guidelines at the time (prior to the amendments) to calculate the defendant’s sentence. *See id.* (detailing how district court judge determined defendant’s sentence). The defendant’s previous sentencing range was between ninety-two to one hundred and fifteen months imprisonment, but after the guideline amendments his new sentencing range would be seventy-seven to ninety-six months. *See id.* (noting difference between defendant’s previous sentencing range and new sentencing range after amendments).

66. *See id.* at 228 n.2 (explaining that departures granted to career offenders presents somewhat different scenario).

67. *See id.* (stating difference between two is that defendants who are labeled career offenders can receive downward departures based on crack cocaine guidelines, while defendants subject to mandatory minimums cannot).

68. 556 F.3d 226 (4th Cir. 2009) (considering motion for resentencing by defendant who received substantial assistance departure from mandatory minimum).

69. *See id.* at 228 (explaining procedural posture).

70. *See id.* (stating defendants were both subject to mandatory minimum sentences of 240 months due to crack cocaine violations).

71. *See id.* (noting court’s award of downward departure to both defendants for providing substantial assistance to government).



imum guidelines, which do not create a new applicable guideline.<sup>72</sup> Again, like other circuits, the Fourth Circuit determined that district courts are unable to base downward departures on the crack cocaine guidelines lowered by the Amendment.<sup>73</sup>

While the circuit courts have had a difficult time applying the Amendment to the various classifications of defendants, a report created by Sentencing Commission staff prior to the enactment of the Amendment helps provide some indication of who the intended beneficiaries are.<sup>74</sup> For in-

72. See *id.* at 237 ("No guideline range was applicable, and Amendment 706 did not purport to reduce any factors that the district court was authorized to consider in quantifying a downward departure under § 3553(e).").

73. See *id.* at 234 n.2 ("Moreover, the weight of authority in other circuits undercuts Hood's contention; in short, the extent of a § 3553(e) departure is based solely on the defendant's substantial assistance and other factors related to that assistance."). The court also explained that the Fourth Circuit previously held that downward departures from mandatory minimum sentences qualify as "departures from, not the removal of" a mandatory minimum sentence. See *id.* at 235 (explaining court's previous conclusion that departures from mandatory minimums are nothing more than departures and do not remove mandatory minimum completely). The same reasoning was used by the Eleventh Circuit in *United States v. Williams*. See 549 F.3d 1337, 1341 (11th Cir. 2008) (stating there is no indication that statute permitting downward departure intends to eliminate statutory mandatory minimum). In *Williams*, the defendant pled guilty to distribution of more than five grams of crack cocaine, which would have resulted in a sentence of ninety-two to 115 months on its own. See *id.* at 1338 (explaining charge to which defendant pled guilty and corresponding crack cocaine sentencing guidelines). Nevertheless, due to two prior felony convictions the defendant was subject to a mandatory minimum sentence of 120 months. See *id.* (stating that defendant's previous felony convictions subjected him to mandatory minimum sentence). Regardless, due to the defendant's substantial assistance, he too was granted a downward departure and ultimately received a sentence of sixty months plus eight years of probation. See *id.* (describing ultimate sentence defendant received after court took into consideration defendant's substantial assistance to government). In addition, the district court informed the defendant and the government that it was considering lowering the defendant's sentence to fifty months because Amendment 706 reduced the crack cocaine base levels. See *id.* (noting court's consideration of Amendment and its potential impact on case). Nevertheless, the Eleventh Circuit denied the defendant's motion for resentencing, holding that the defendant's sentence was not based on the crack cocaine guidelines, but rather was based on the mandatory minimum and, therefore, was ineligible for resentencing. See *id.* at 1342 (explaining that because defendant was subject to mandatory minimum that replaced original crack cocaine guidelines he was ineligible for resentencing). The Eleventh Circuit focused its reasoning on the fact that the statute authorizing downward departures from mandatory minimum sentences does not indicate that granting a departure removes the mandatory minimum from being the applicable guideline range. See *id.* at 1341 (explaining court did not believe granting downward departures in these situations dispensed of or waived mandatory minimum).

74. See Schmitt, *supra* note 4, at 5 (indicating types of cases that would be eligible for retroactive application of crack cocaine amendments). The report indicated that the cases would need to fit into the following criteria:

- (A) crack cocaine was involved in the offense;
- (B) the base offense level was greater than level 12;
- (C) the base offense level was not level 43;



stance, in the Commission's prediction of the expected percentage of defendants who would be affected by the Amendment's enactment, it listed the types of defendants who would be eligible for resentencing.<sup>75</sup> The report indicated that defendants who received downward departures from mandatory minimums for substantial assistance would be eligible, even if the departure was based on a Rule 35 motion after the date of the original sentencing.<sup>76</sup> Although circuit courts are not bound by the report, it does provide a good reference for courts trying to determine the Sentencing Commission's intent in promulgating the amendments.<sup>77</sup> Not surprisingly, the report has been referenced by circuit courts attempting to determine the application of the Amendment.<sup>78</sup>

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(D) the quantity of crack cocaine involved in the offense was less than 4,500 grams;

(F) the offender's final offense level was not derived from the career offender or armed career offender guideline;

(G) the offender's original sentence was greater than any applicable statutory mandatory minimum punishment, unless the offender received relief from the mandatory minimum punishment pursuant to the statutory safety valve of 18 U.S.C. § 3553(f) (incorporated into the guidelines at § 5C1.2) or the offender received a departure under § 5K1.1 for substantial assistance when originally sentenced.

*Id.* at 5-6 (listing criteria for cases considered eligible for consideration of retroactive application of 2007 crack cocaine amendments).

75. *See id.* at 5 (listing eligible defendants included in Commission staff's analysis of potentially affected defendants if Amendment was enacted).

76. *See id.* 6-7 n.20 (differentiating defendants who did not receive downward departures as ineligible and ones that did as eligible if amendments were passed). The report specifically mentioned the Rule 35 motion defendants to point out that the report did not include them in the number of possibly affected prisoners because the Commission did not have data on offenders who receive downward departures after the date of their original sentence. *See id.* (explaining that additional group of prisoners will be affected but that they are not reflected in numbers because Commission's data did not include information as to who receives downward assistance after original sentencing).

77. *See United States v. Doe*, 564 F.3d 305, 318 (3d Cir. 2009) (Fuentes, J., concurring) (acknowledging report could be good indication of what Sentencing Commission intended by passing crack cocaine amendments).

78. *See United States v. Williams*, 549 F.3d 1337, 1341 (11th Cir. 2008) (acknowledging that Sentencing Commission report indicated that defendants subject to mandatory minimums who received substantial assistance would be eligible for resentencing); *see also Doe*, 564 F.3d at 318 (Fuentes, J., concurring) (noting uncertainty as to weight of authority that report should be given, but acknowledging that it raises question about how Sentencing Commission intended amendments to be applied).

III. *UNITED STATES V. DOE: ANOTHER ANGLE*A. *Factual Background of Doe*

The appellants in *Doe*,<sup>79</sup> John and Jane Doe, both pled guilty to charges of conspiracy to distribute and distribution of crack cocaine.<sup>80</sup> Additionally, they entered into plea agreements with the government.<sup>81</sup> John Doe's total adjusted offense level, which determines the sentencing range of the defendant when combined with the defendant's criminal history, was a thirty-three, and his criminal history category was two.<sup>82</sup> Based on these levels, the crack cocaine offenses subjected him to a sentencing range of 151 to 188 months of imprisonment; however, because of a previous drug conviction, John Doe was also subject to a mandatory minimum of life in prison.<sup>83</sup> Because the mandatory minimum was greater than the applicable crack cocaine guidelines, the district court imposed the mandatory minimum sentence pursuant to U.S.S.G. § 5G1.1.<sup>84</sup> Despite this ruling, the government made a motion for a downward departure due to the substantial assistance the defendant provided to the government.<sup>85</sup> The district court ultimately sentenced the defendant to eighty-four months imprisonment, lower than the mandatory minimum and the original crack cocaine guidelines.<sup>86</sup>

Jane Doe's sentencing followed a similar path, commencing with a total adjusted offense level of thirty-four and a criminal history of category two.<sup>87</sup> These figures combined to result in a sentencing range of 121 to

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79. 564 F.3d 305 (3d Cir. 2009).

80. *See id.* at 307 (identifying defendants and charges to which they pled guilty). Each defendant pled guilty to one count of conspiracy to distribute crack cocaine (21 U.S.C. § 846) and one count of distribution of crack cocaine (21 U.S.C. § 841(a)(1)). *See id.* (describing charges at issue).

81. *See id.* (noting both defendants entered into plea agreements with government).

82. *See id.* (describing John Doe's total adjusted offense level and criminal history category).

83. *See id.* at 308 (noting John Doe was subject to mandatory minimum because of previous drug conviction).

84. *See id.* (pointing out that district court was required to use mandatory minimum as guideline sentence because it exceeded the crack cocaine guidelines pursuant to U.S.S.G. § 5G1.1).

85. *See id.* (explaining government moved for downward departure from mandatory minimum because of substantial assistance defendant provided to government).

86. *See id.* (acknowledging district court's ultimate sentence was below both guideline ranges that could have applied to defendant). The downward departure from the mandatory minimum was granted pursuant to 18 U.S.C. § 3553(e) and the departure from the crack cocaine guidelines pursuant to U.S.S.G. § 5K1.1. *See id.* (pointing out statutory authority used by district court to depart from both guideline ranges).

87. *See id.* (acknowledging Jane Doe's total adjusted offense level and her criminal history category of two). While her base offense level was a thirty-four, she received a three-level reduction for accepting responsibility. *See id.* (explaining elements of Jane Doe's total adjusted offense level).



151 months imprisonment based on the crack cocaine guidelines.<sup>88</sup> Nevertheless, like John Doe, she was subject to a mandatory minimum sentence of twenty years due to a prior drug conviction.<sup>89</sup> Once again, the mandatory minimum became the guidelines sentence; however, Jane Doe also provided substantial assistance and, after a motion by the government to such effect, the district court granted her a downward departure.<sup>90</sup> In the end, Jane Doe was sentenced to forty-one months imprisonment, significantly below both the mandatory minimum sentence and the original crack cocaine guidelines.<sup>91</sup> After the Sentencing Commission enacted Amendment 706 and made it retroactive, both defendants filed motions for reductions in their sentences.<sup>92</sup> The district court denied both motions because it believed that granting a reduction would not be consistent with the policy statement issued by the Sentencing Commission.<sup>93</sup>

#### B. *Filling the Cracks: The Third Circuit Denies Both Motions*

The Third Circuit's decision in *Doe* is significant because it signals the possible end to crack cocaine litigation for any career offenders or defendants subject to mandatory minimum sentences.<sup>94</sup> In *Doe*, the court held that the Sentencing Commission's policy statement issued in conjunction with the resentencing statute effectively bars courts from reducing defendants' sentences when they were subject to a mandatory minimum sen-

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88. *See id.* (noting applicable guideline range based on crack cocaine guidelines).

89. *See id.* (explaining that Jane Doe's previous drug conviction subjected her to mandatory minimum sentence).

90. *See id.* (pointing out that Jane Doe was also subject to mandatory minimum sentence for previous drug conviction but received downward departure because of substantial assistance provided to government). Again, the government moved for a downward departure from the mandatory minimum pursuant to Section 3553(e) and from the original crack cocaine guidelines pursuant to U.S.S.G. § 5K1.1. *See id.* (listing statutory authority for granting departures from mandatory minimum and original crack cocaine guidelines).

91. *See id.* (acknowledging Jane Doe's ultimate sentence was significantly below both mandatory minimum sentence and original crack cocaine guidelines).

92. *See id.* (explaining that both defendants made motions for reduced sentences after Sentencing Commission passed Amendment 706 and made it retroactive).

93. *See id.* (noting district court denied both motions because granting sentence reductions would not have been consistent with Sentencing Commission's policy statement).

94. *See Sarah Gannett, Has the Third Circuit Ended Crack Litigation?*, THIRD CIRCUIT BLOG (May 1, 2009), [http://circuit3.blogspot.com/2009\\_05\\_01\\_archive.html](http://circuit3.blogspot.com/2009_05_01_archive.html) (pointing out possibility that Third Circuit ended crack litigation for resentencing for any career offender or defendant subject to mandatory minimum that received downward departures).

tence, even if they received a downward departure.<sup>95</sup> The majority opinion methodically rejected six arguments raised by the defendants.<sup>96</sup>

The Third Circuit started its analysis by identifying the two prongs a defendant must satisfy to be eligible for a sentence reduction under the resentencing statute.<sup>97</sup> They are: (1) “the defendant must have been ‘sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission’”; and (2) the reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.”<sup>98</sup> The majority focused on the second prong—specifically, the policy statement that requires an amendment to “have the effect of lowering the defendant’s applicable guideline range.”<sup>99</sup> The court believed that the case could be decided solely on this prong—because both must be satisfied—and, therefore, did not feel compelled to extensively address the defendants’ arguments addressing the first prong.<sup>100</sup> Instead, this conclusion allowed the court to ignore the defendants’ theory that their downward departures for substantial assistance were partially “based on” the now-amended crack cocaine guidelines, and which would have addressed the first prong of the test.<sup>101</sup>

The court also rejected the theory that requiring a defendant to satisfy the policy statement had the effect of redefining the term “based on” used in the first prong.<sup>102</sup> Specifically, the court used the plain language of the statute to reject the suggestion that the Sentencing Commission did

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95. *See Doe*, 564 F.3d at 315 (stating that policy statement issued by Sentencing Commission creates jurisdictional bar to sentence modification when defendant was subject to mandatory minimum sentence).

96. *See id.* (addressing and rejecting six arguments presented by defendant).

97. *See id.* at 309 (pointing out defendants must satisfy two elements of resentencing statute to qualify for sentence reductions).

98. *See id.* (listing two elements of resentencing statute that need to be satisfied for defendant to be eligible for sentencing reduction).

99. *See id.* (noting that policy statement issued in conjunction with resentencing statute requires amendments to have lowered defendant’s applicable guideline range).

100. *See id.* at 310 (stating that case could be decided based on second element).

101. *See id.* (rejecting defendants’ first argument).

102. *See id.* (rejecting theory that requiring second element to be satisfied redefines “based on” from first element). Specifically, the defendant argued that requiring the Amendment to have the effect of lowering the mandatory minimum sentence foreclosed the possibility that “based on” could have other meanings than just the mandatory minimum sentence. *See id.* (explaining defendant’s theory that requiring Amendment to have specific effect of lowering mandatory minimum sentence redefines “based on”). The defendant argued that the statutes must be read with their ordinary meaning in mind and that “basis” can mean “a supporting layer or part.” *See id.* (explaining defendant’s interpretation of statute). This, according to the defendant, would suggest that the resentencing statute does not require that the sentencing range lowered by the Amendment be the sole or primary basis for the ultimate sentence. *See id.* (explaining defendant’s argument regarding implications and requirements of sentencing statute).



not intend the second prong to be a requirement of eligibility.<sup>103</sup> The resentencing statute states that any sentence reduction must be “consistent with applicable policy statements issued by the Sentencing Commission,” which the court determined not only incorporates the two elements, but also makes them complementary.<sup>104</sup>

Next, using language from the guidelines and Third Circuit precedent, the court rejected the defendants’ argument that the Amendment only needs to lower the defendants’ initial guideline range.<sup>105</sup> The court’s reasoning focused on language from the Sentencing Commission’s Sentencing Manual, which instructs judges on how to calculate a defendant’s sentence.<sup>106</sup> The last step of the instructions calculates the mandatory minimum, which the court determined indicated that the mandatory minimum would be the “applicable guideline range” referred to in the policy statement.<sup>107</sup> In addition, the court also supported its reasoning with language from U.S.S.G. § 5G1.1(b), which states “[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.”<sup>108</sup> To complement the manual, the court also cited the Third Circuit’s previous decision in *Cordero*, which held that mandatory minimum sentences “subsume and displace” the original guideline ranges and become the starting point for any downward departure the court may grant a defendant.<sup>109</sup> Though the issue in *Cordero* focused on determining the starting point for applying downward

103. *See id.* (noting that statute also requires policy statement be applied under plain language of statute).

104. *See id.* (suggesting Congress not only intended to incorporate elements but also wanted them to be complementary). The court acknowledged that the policy statement is definitely a narrower statement, but that it does not contradict the resentencing statute. *See id.* at 311 (pointing out that policy statement does not contradict resentencing statute).

105. *See id.* (rejecting defendant’s argument that Amendment need only to lower initial guideline range by employing language from guidelines and Third Circuit precedent).

106. *See id.* (looking to Commission’s general instructions on how to apply guidelines).

107. *See id.* (“Therefore, as the District Court held, the calculation of the statutory mandatory minimum under § 5G1.1(b), not that of the initial Guideline range under § 5A, was the final step in determining the Appellants’ applicable Guideline ranges.”).

108. *See id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(b)).

109. *See id.* (citing *United States v. Cordero*, 313 F.3d 161, 166 (3d Cir. 2002)) (stating that mandatory minimum sentence is not waived when defendant receives downward departure). In *Cordero*, the defendant was subject to a mandatory minimum sentence and was granted a downward departure. *See id.* (citing *Cordero*, 313 F.3d at 162) (providing facts of *Cordero* case). The defendant attempted to appeal and argue that the downward departure should have been applied to the initial guidelines rather than the mandatory minimum sentence; however, the Third Circuit concluded that courts are required to calculate the departure using the mandatory minimum sentence as the starting point. *See id.* (citing *Cordero*, 313 F.3d at 166) (explaining holding of case).

departures, not resentencing proceedings, the court applied the same reasoning and required that the term “applicable guideline range” refer to the mandatory minimum sentence that subsumes the initial guidelines.<sup>110</sup>

The next issue addressed by the court was whether, after *United States v. Booker*,<sup>111</sup> the Sentencing Commission’s policy statement could be considered simply advisory for a court in a resentencing proceeding.<sup>112</sup> This argument was rejected because of previous Third Circuit precedent stating that *Booker* did not apply to proceedings under the resentencing statute that can only have the effect of lowering a defendant’s sentence rather than increasing it.<sup>113</sup> The court previously held that *Booker* only “applie[d] to full sentencing hearings—whether in an initial sentencing or in a resentencing where the original sentence is vacated for error.”<sup>114</sup> The court acknowledged the Ninth Circuit’s holding that the guidelines were advisory in all contexts,<sup>115</sup> but ultimately chose to adopt the reasoning of the Fourth, Eighth, and Tenth Circuits, which all rejected the Ninth Circuit’s approach.<sup>116</sup>

The court then addressed the defendants’ argument that its reasoning compels “patently absurd and unfair results.”<sup>117</sup> For example, a defendant could be subject to a mandatory minimum but have high offense levels that result in the initial crack cocaine guidelines being above the

110. *See id.* (acknowledging that cases address different issues but concluding same reasoning applies).

111. 543 U.S. 220 (2005).

112. *See Doe*, 564 F.3d at 312 (addressing defendant’s argument that policy statement is not mandatory or binding on court after *Booker*).

113. *See id.* at 313 (stating *Booker* does not apply to such resentencing proceedings because they lower defendants’ sentences rather than increasing them). In *Booker*, the Supreme Court held that it was a violation of the Sixth Amendment for a judge to give a defendant an enhanced sentence based on the judge’s determination of a fact that the defendant did not admit or that was not found by the jury. *See id.* (citing *Booker*, 543 U.S. at 244) (pointing out Supreme Court’s holding in *Booker*). Because the Supreme Court’s holding was incompatible with the mandatory sentences promulgated by the Sentencing Commission it severed the provision in the sentencing guidelines that made them mandatory. *See id.* (citing *Booker*, 543 U.S. at 245) (explaining reasoning of Supreme Court for severing mandatory provision of sentencing guidelines).

114. *See id.* at 313 (stating Third Circuit has previously held that provisions are not advisory during resentencing proceedings). The court went on to point out that *Booker* was intended to apply to sentencing hearings that enhanced the defendant’s sentence, not to proceedings that lowered it. *See id.* (explaining that proceedings that lowered defendants’ sentences were not intended to be affected). In addition, the court noted that the resentencing proceedings were not mentioned in the *Booker* decision as further indication that the Supreme Court did not intend for its holding to apply to those types of proceedings. *See id.* (indicating that Supreme Court did not mention resentencing proceedings in its opinion).

115. *See United States v. Hicks*, 472 F.3d 1167, 1169 (9th Cir. 2007) (holding that sentencing guidelines were advisory in all contexts).

116. *See Doe*, 564 F.3d at 314 (noting that majority of courts have disagreed with Ninth Circuit’s holding).

117. *See id.* (addressing defendants’ fifth argument that court’s reasoning produces were absurd and rendered unfair results).



mandatory minimum sentence and the mandatory minimum not being applied.<sup>118</sup> Such a defendant would be eligible to seek a reduction of his or her sentence while defendants with offense levels below the mandatory minimum would not.<sup>119</sup> Nevertheless, the court was not persuaded by the potential results and cited *Cordero* and the statutory language contained in Section 3582(c)(2) in support of its position.<sup>120</sup>

Finally, the court rejected the defendants' argument that the district court should not have denied their motion, but rather should have applied the rule of lenity.<sup>121</sup> The court acknowledged that in certain situations a reasonable doubt exists as to whether the rule should be applied, but explained it does not need to be applied "simply because a statute requires consideration and interpretation to confirm its meaning."<sup>122</sup> Rather, in *Doe*, the court believed it did not have to resort to the rule of lenity because the phrases "based on" and "the effect of lowering the defendant's applicable guideline range" could be interpreted using the language structure, subject matter, context, and history of the resentencing statute, and the Sentencing Commission's policy statement.<sup>123</sup>

#### IV. *DOE'S EFFECT ON THE RESENTENCING OF PREVIOUS CRACK COCAINE OFFENDERS*

The Third Circuit's result in *Doe* has support in other circuits that have dealt with similar defendants.<sup>124</sup> Nevertheless, how the Third Circuit came to that result is perhaps the most significant aspect of the decision that will impact future litigants.<sup>125</sup> Most circuits that have reached the same result have affirmed denials of these motions pursuant to the resen-

118. *See id.* (detailing defendants' example of situations where unfair results would occur).

119. *See id.* (pointing out how defendants with higher offense levels can be eligible for sentence reductions while defendants with lower offense levels may not). The defendants also pointed out that they were not permitted to benefit from the amended guideline range and that their substantial assistance did not address the injustice that was the propelling force behind the crack cocaine amendments. *See id.* (suggesting two other results that occur under court's reasoning and that produce unfair treatment).

120. *See id.* (rejecting defendants' argument regarding unfair results based on *Cordero* holding and language contained in resentencing statute).

121. *See id.* (rejecting defendants' argument that court should have applied rule of lenity in interpreting statute).

122. *See id.* at 315 (explaining that rule of lenity does not need to be applied simply because statute needs further consideration and interpretation).

123. *See id.* (determining that rule of lenity was not necessary to interpret statute because of available alternatives helpful in assessing its meaning).

124. *See United States v. Hood*, 556 F.3d 226, 236-37 (4th Cir. 2009) (holding that defendant's sentence was based on statutory mandatory minimum and not based on initial crack cocaine guidelines); *United States v. Williams*, 549 F.3d 1337, 1342 (11th Cir. 2008) (stating statutory mandatory minimum replaced original crack cocaine guidelines and, therefore, could not be based on them).

125. *See Doe*, 564 F.3d at 318 (Fuentes, J., concurring) (pointing out that majority opinion does not differentiate these defendants from career offenders who

tencing statute's first requirement, which dictates that downward departures from mandatory minimums are "based on" the mandatory minimum—as opposed to the initial crack cocaine guidelines.<sup>126</sup> This conclusion is logical because judges in those circuits are not allowed to consider the initial crack cocaine guidelines when granting substantial assistance departures from mandatory minimum sentences.<sup>127</sup> This reasoning, however, is harder to follow in the Third Circuit because judges are actually allowed to consider the seriousness of the defendant's offense and original crack cocaine guidelines when determining the substantial assistance departure.<sup>128</sup> Presumably this difference forced the Third Circuit to rely on the Commission's policy statement for their denial—something the majority of circuits have not done—because the defendants would have appeared eligible for resentencing if the district court did use the original crack cocaine guidelines when determining the defendants' downward departure.<sup>129</sup>

The Third Circuit held that, for defendants subject to mandatory minimums, the policy statement bars the court from reducing the sentence regardless of whether the judge grants their departure based on the amended guidelines.<sup>130</sup> This reasoning could adversely affect career offenders who receive downward departures in the Third Circuit.<sup>131</sup> In particular, it could impact career offenders who receive downward departures due to overstatement of their criminal history in the classification, even though this group has been relatively successful when seeking reduced sentences in other circuits.<sup>132</sup> In both circumstances, the defendant's

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judges determine should be granted downward departures, because that classification overstates their criminal history).

126. *See, e.g., Hood*, 556 F.3d at 236-37 (holding that defendant's sentence was based on statutory mandatory minimum); *Williams*, 549 F.3d at 1342 (stating statutory mandatory minimum replaced original crack cocaine guidelines).

127. *See Doe*, 564 F.3d at 315 n.1 ("[A]ll other circuits to have addressed the issue have held that the maximum extent of a substantial assistance departure may be based only on the defendant's substantial assistance.").

128. *See id.* at 315 (acknowledging that Third Circuit allows judges to consider seriousness of defendant's offense when determining extent of substantial assistance departure).

129. *See id.* at 315-16 (Fuentes, J., concurring) (explaining that plain meaning of policy statement suggests defendants would be eligible for resentencing because district court used initial guideline range that was lowered to determine extent of downward departure).

130. *See id.* at 310 (majority opinion) (refusing to address defendant's argument that departure was based on amended crack cocaine guidelines because case could be decided solely on second element of resentencing statute).

131. *See id.* at 318 (Fuentes, J., concurring) (pointing out that majority does not differentiate defendant's circumstances from those of career offenders who receive downward departures).

132. *See United States v. McGee*, 553 F.3d 225, 229 (2d Cir. 2009) (holding that career offenders may be eligible for reduced sentences when they were originally granted downward departures because career offender classification overrepresented their criminal history); *United States v. Moore*, 541 F.3d 1323, 1329-30 (11th Cir. 2008) (same); *United States v. Willis*, No. CR 02-120-RE, 2008 WL



mandated sentence is deemed inappropriate and the defendant receives a downward departure based on the original guidelines.<sup>133</sup>

In the future, these career offenders should focus their argument on differentiating the procedure of granting downward departures for career offenders from the departure procedure used for defendants subject to a mandatory minimum.<sup>134</sup> Specifically, a defendant should argue that, when a judge determines that the career offender classification overstates the defendant's criminal history, sentencing the defendant within the original crack cocaine guidelines represents a complete departure from the career offender classification.<sup>135</sup> Making this distinction in future Third Circuit cases will be critical for defendants because *Doe's* holding rests on the court's conclusion that the mandatory minimum sentence replaces the original crack cocaine guidelines.<sup>136</sup> If a defendant cannot convince the court that the career offender classification does not subsume the original crack cocaine guidelines permanently, the defendant's argument will likely face a similar fate as the defendants' argument in *Doe*.<sup>137</sup>

Notably, the court did not address the impact of its holding on career offenders who receive downward departures because they provided substantial assistance to the government.<sup>138</sup> The circuits that have recently addressed this issue have generally denied these defendants' resentencing motions, again relying on judges' inability to consider the original crack cocaine guidelines when granting downward departures for substantial as-

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4793688 (D. Or. Oct. 30, 2008) (same); *United States v. Ragland*, 568 F. Supp. 2d 19, 20 (D. D.C. 2008) (same); *United States v. Clark*, Crim. No. 00-037, 2008 WL 2705215, at \*1 (W.D. Pa. July 7, 2008) (same); *United States v. Cornish*, Crim. No. 05-337 (SRC), 2008 U.S. Dist. LEXIS 50577, at \*7-8 (D. N.J. June 25, 2008) (same); *United States v. Poindexter*, 550 F. Supp. 2d 578, 580-581 (E.D. Pa. 2008) (same); *United States v. Nigatu*, Crim. No. 00-18 (PAM), 2008 WL 926561 (D. Minn. Apr. 7, 2008) (same); cf. *United States v. Boyd*, Crim. No. 01-29 Erie, 2008 WL 2537139, at \*3 (W.D. Pa. June 24, 2008) (suggesting reduction would be warranted if § 4A1.3 departure to § 2D1.1 range had been granted).

133. See *Doe*, 564 F.3d at 318 (Fuentes, J., concurring) (explaining that both scenarios present situations where mandated sentences are deemed inappropriate and recognizing that initial crack cocaine guidelines may play role in determining proper sentence).

134. See *McGee*, 553 F.3d at 228 n.2 (stating that departures from career offender guidelines present different scenario than departures from mandatory minimums).

135. See *id.* ("Put differently, a departure back down to the initially applicable crack cocaine guideline range accepts that a defendant does not fall within the heartland of the career offender guidelines.").

136. See *Doe*, 564 F.3d at 311 (stating mandatory minimum subsumes original crack cocaine guidelines and becomes defendant's applicable guideline range).

137. See *id.* at 312 ("The initial ranges have been subsumed. Accordingly, Amendment 706 does not have the effect of lowering the Appellants' applicable Guideline ranges because the mandatory minimums were unaffected by Amendment 706.").

138. See generally *id.* at 305-18 (failing to address impact decision has on career offenders who receive downward departures for providing substantial assistance).

sistance.<sup>139</sup> Consequently, a defendant should emphasize that Third Circuit sentencing procedure allows judges to consider the crack cocaine guidelines when granting downward departures based on substantial assistance.<sup>140</sup> As the judge is allowed to consider the guidelines when deciding how much of a departure to grant, defendants should attempt to convince the court that their sentence would have been lower if the amended guidelines had been in effect at that time.<sup>141</sup> There is room for disagreement, as evidenced by the conflicting results throughout the circuits, but a future litigant should raise the rule of lenity while also appealing to the underlying purpose of the Amendment.<sup>142</sup> The Amendment was enacted to address the “urgent and compelling” problem that plagued the prior 100-to-1 drug quantity ratio.<sup>143</sup> In addition, the Supreme Court reserves lenity for situations where a “reasonable doubt persists about a statute’s intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.”<sup>144</sup> While the majority may have rejected this argument in *Doe*, future litigants need only look to Judge Fuentes’ concurring opinion to see that a reasonable doubt still exists.<sup>145</sup>

#### V. CONCLUSION

The full effect of the Third Circuit’s holding in *Doe* remains to be seen, but surely its ramifications on crack cocaine defendants seeking resentencing are considerable.<sup>146</sup> Additionally, the current impact of the majority’s reasoning allows for unusual results—providing more serious

139. See, e.g., *United States v. Williams*, 551 F.3d 182, 187 (2d Cir. 2009) (explaining that defendant’s substantial assistance departure should not have been influenced by original crack cocaine guidelines because judge may only consider substantial assistance provided to government); *United States v. Moore*, 541 F.3d 1323, 1330 (11th Cir. 2008) (stating defendant’s downward departure from career offender classification because of substantial assistance was different process than when court granted departure due to overrepresentation of criminal history).

140. See *Doe*, 564 F.3d at 315 (stating Third Circuit precedent allows district courts to consider seriousness of defendant’s offense when determining extent of downward departure).

141. See *United States v. McGee*, 553 F.3d 225, 228 (2d Cir. 2009) (“Since . . . the district court sentenced McGee based on the crack cocaine guidelines and would likely have considered a different sentence from the one imposed if the applicable crack guidelines had so provided, we think that a different reading would lend itself to excessive formalism.”).

142. See *id.* at 229-30 (stressing importance of underlying purpose of Amendment and use of rule of lenity in these situations).

143. See *id.* at 229 (explaining that Amendment was enacted to address compelling and urgent problem that existed within current drug-quantity ratio).

144. See *id.* (acknowledging that Supreme Court uses rule of lenity in similar situations where reasonable doubt still exists after resort to available alternatives).

145. See *Doe*, 564 F.3d at 318 (Fuentes, J., concurring) (“While its language barely favors the majority’s interpretation, I am unsure whether our reading of the policy statement truly reflects the intent of its drafters.”).

146. See *Gannett*, *supra* note 94 (highlighting possibility that Third Circuit ended crack litigation for resentencing of any career offender or defendant subject to mandatory minimum who received downward departures).



offenders opportunities to seek reduced sentences while denying defendants with lower offenses that same opportunity.<sup>147</sup> While the question of how this holding will apply to career offenders is still open, the majority's reasoning certainly provides caution for future litigants.<sup>148</sup> In the future, courts should be vigilant to avoid allowing excessive formalism to dilute the Amendment's intent by denying relief to defendants who were disadvantaged by the very disparity it sought to correct.<sup>149</sup> Hopefully, future decisions will resolve the conflicting applications that currently exist among the circuits, and prompt the Sentencing Commission to provide further clarity so that courts are no longer forced to make educated guesses.<sup>150</sup>

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147. See *Doe*, 564 F.3d at 317 (Fuentes, J., concurring) (explaining "absurd" results from reasoning employed by majority opinion).

148. See *id.* (noting that court does not differentiate *Doe*'s circumstances from another similar category that circuits have ruled eligible for resentencing under policy statement).

149. See CRACK COCAINE SENTENCING REFORM: A MODEST STEP IN THE RIGHT DIRECTION, *supra* note 1 (explaining why Sentencing Commission decided to reduce guideline range).

150. See *Doe*, 564 F.3d at 318 (Fuentes, J., concurring) (expressing discomfort with majority's interpretation of policy statement and uncertainty as to whether court truly reflected intention of Sentencing Commission).