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## ARTICLES

# **BRIDGING THE GAP: HOW *UNITED STATES v. MUNN* CORRECTLY INTERPRETS THE LEGISLATIVE INTENT OF AMENDMENT 706 ADDRESSING THE DISPARITY BETWEEN CRACK AND COCAINE OFFENSES**

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### I. INTRODUCTION

Picture a scenario where two defendants, one in Minnesota and the other in Virginia, with the same criminal history, have both been convicted of selling crack cocaine. While the defendants were incarcerated, the Sentencing Commission passed a retroactive amendment that authorized a sentence reduction for all crack cocaine related offenses. As a result, picture that the Virginia defendant was entitled to this sentence reduction while the Minnesota defendant was forced to finish the remainder of his original sentence. Now imagine that the basis of this determination was solely on their respective United States Appellate Court's interpretation of the Application Instructions to the Sentencing Guidelines in conjunction with the retroactive amendment. To some, this scenario might seem bizarre, but this exact hypothetical is happening within the United States today.

On May 1, 2007, the Sentencing Commission passed Amendment 706 to the Sentencing Guidelines to remedy the disparity between crack and powder cocaine convictions.<sup>1</sup> This retroactive statute grants defendants who were convicted of crack related offenses a sentence reduction for sentencing guideline purposes.<sup>2</sup> In applying Amendment 706, in combination with the Application Instructions to the Sentencing Guidelines, some jurisdictions have failed to follow the legislative intent of this amendment. Recently, in *United States v. Munn*, the Fourth Circuit opined that a defendant who was convicted of a crack

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\* B.A., North Carolina State University, Political Science 2007; J.D. (cand.) North Carolina Central University School of Law, 2011. I would like to dedicate this casenote to my parents, Anthony and Peggy Goodson, for being my biggest supporters and greatest inspiration.

1. *United States v. Munn*, 595 F.3d 183, 185-86 (4th Cir. 2010) (explaining the purpose of Amendment 706).

2. *See* U.S.S.G. § 2D1.1(c) (2010).

related offense is eligible for a reduced sentence.<sup>3</sup> In this opinion, the Court provided sound reasoning for opposed jurisdictions to consider before depriving another defendant of his right to liberty.

The following note will focus on the effect the *Munn* decision will have on defendants convicted of crack related offenses prior to the passage of Amendment 706. Further, this note will analyze the split among the appellate circuits and how the decision in *Munn* reconciles this inconsistency. Finally, the note will discuss how the Fourth Circuit followed the legislative intent of Amendment 706 and explain why there is a direct need for uniformity among each circuit court.

## II. *United States v. Munn*

*United States v. Munn* arises from an appeal of the District Court's denial of Raeford Munn's (Munn) motion for a reduced sentence.<sup>4</sup> In January 2001, Munn was charged with a single count of distributing 155.1 grams of crack cocaine.<sup>5</sup> Under a plea agreement, Munn plead guilty and was sentenced three months later.<sup>6</sup>

Following Munn's guilty plea, the probation officer submitted his Presentence Investigation Report ("PSR"), which recommends the applicable offense level and criminal history for determining Munn's applicable guideline range.<sup>7</sup> This PSR is used for sentencing guideline purposes.<sup>8</sup> The PSR report found that normally, Munn's conviction warranted a base offense level of 36 with a criminal history category of IV.<sup>9</sup> However, under USSG § 4B1.1 of the sentencing guidelines, the PSR recommended that Munn be considered a career offender based on his two previous convictions.<sup>10</sup> This recommendation enhanced Munn's offense level to 37 and his criminal history to a category VI.<sup>11</sup> The PSR then applied a three level reduction for acceptance of responsibility and arrived at a base offense level of 34 with an applicable guideline range of 262 to 327 months in prison.<sup>12</sup>

Prior to the sentencing hearing, Munn objected to his classification as a career offender and moved for a downward departure pursuant to USSG § 4A1.3.<sup>13</sup> Munn argued that his prior criminal offenses significantly over-represented the seriousness of his criminal history and the

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3. *Munn*, 595 F.3d at 195.

4. *Id.* at 184.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 185.

11. *Id.*

12. *Id.*

13. *Id.*

likelihood that the he will commit any further crimes.<sup>14</sup> At the sentencing hearing, the Court rejected Munn's contention that he was not a career offender.<sup>15</sup> The Court did, however, determine that Munn's prior convictions over-represented his criminal history and that he was entitled to an over-representation departure under USSG § 4A1.3.<sup>16</sup> As a result, the Court adopted the PSR's classification of Munn as a career offender, which gave Munn an offense level of 34.<sup>17</sup> However, the Judge reduced Munn's sentence by 51 months for his assistance in convicting other criminals and by an additional 60 months for his over-represented criminal history.<sup>18</sup>

While Munn was serving his sentence, on May 1, 2007, the Sentencing Commission passed Amendment 706, which granted a sentence reduction for crack related offenses.<sup>19</sup> On July 24, 2009, Munn filed a post-sentencing motion requesting a reduced sentence.<sup>20</sup> Munn argued that Amendment 706 to the Sentencing Guidelines entitled him to a sentence reduction because he was convicted of a crack related offense.<sup>21</sup> The District Court denied Munn's motion "concluding that Munn was ineligible for a reduced sentence under § 3582(c)(2) because Amendment 706 did not affect Munn's status as a career offender and, therefore, did not lower his applicable guideline range."<sup>22</sup> As such, the District Court found that it lacked jurisdiction to reduce Munn's sentence.<sup>23</sup>

On February 17, 2010, the Fourth Circuit Court of Appeals held that the lower court "misinterpreted the limits of its authority" when it denied Munn's § 3582(c)(2) motion for a reduced sentence.<sup>24</sup> The Fourth Circuit agreed with the District Court that Amendment 706 does not apply to a defendant who has been sentenced under "another guideline or statutory provision," like the career offender guidelines.<sup>25</sup> However, the Court held that in reading the sentencing application instructions, "a sentencing court cannot calculate the applicable guideline range without first determining the defendant's criminal history category."<sup>26</sup> Characterization of a defendant as a career offender is

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 186.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 187.

25. *Id.*

26. *Id.*

encompassed in making this determination.<sup>27</sup> As such, “it follows that the court has yet to arrive at the applicable guideline range.”<sup>28</sup> Since the court has yet to determine the applicable guideline range, an “[o]verrepresentation [d]eparture, under the [a]pplication [i]nstructions, is a departure *to*, as opposed to a departure *from*, the applicable guideline range.”<sup>29</sup> Therefore, the Court held that Munn’s applicable guideline range, after being granted an overrepresentation departure, is based on the Crack Guidelines, rather than Munn’s status as a career offender.<sup>30</sup>

The Fourth Circuit also recognized the interpretations taken by other jurisdictions and reasoned that when a statute is ambiguous, the Court should be “*obliged* to apply the rule of lenity and resolve the conflict in the defendant’s favor.”<sup>31</sup> The Court of Appeals recognized a need for deference for defendants when a statute consists of language that is difficult to follow.<sup>32</sup> The Court vacated the District Court’s decision and held that “[b]ecause Munn was thus burdened by the severe ratio that Amendment 706 sought to correct, he [was] eligible to pursue a sentence reduction.”<sup>33</sup>

### III. BACKGROUND

Prior to passing Amendment 706 by the Sentencing Commission, powder and crack cocaine offenses were “handled very differently for sentencing purposes.”<sup>34</sup> Crack cocaine offenses resulted in sentences “three to six times longer than those for powder offenses involving equal amounts of drugs.”<sup>35</sup> Recognizing this disparity, the Sentencing Commission passed Amendment 706, which “reduced by two levels the base offense level assigned to each threshold quantity of crack listed in the drug Quantity Table.”<sup>36</sup> Later, the Sentencing Commission made Amendment 706 apply retroactively to crack related offenses, effective March 3, 2008.<sup>37</sup> 18 U.S.C. § 3582(c)(2) grants a district court the jurisdiction to modify a defendant’s sentence if the term of imprisonment was “based on a sentencing range that has sub-

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27. *Id.*

28. *Id.*

29. *Id.* at 193.

30. *Id.* at 195.

31. *Id.* at 194.

32. *Id.*

33. *Id.* at 195.

34. See *Kimbrough v. U.S.*, 552 U.S. 85, 94 (2007).

35. *Id.*

36. *Munn*, 595 F.3d at 186 (citing U.S.S.G. § 2D1.1(c) (2007)); U.S.S.G. Supp. To App. C, Amend. 706 (2007).

37. *Id.* (citing U.S.S.G. Supp. To App. C, Amend. 713 (2008)).

sequently been lowered by the sentencing commission.”<sup>38</sup> A sentence reduction, however, is not authorized if an “amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline or statutory provision.”<sup>39</sup>

The classification of a defendant as a career offender under USSG § 4B1.1 precludes that defendant from seeking a sentence reduction.<sup>40</sup> A defendant is characterized as a career offender if:

- (1) [he] was at least eighteen years old at the time [he] 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) [he] has at least two prior felony convictions of either a crime of violence or a controlled substance offense.”<sup>41</sup>

If a defendant satisfies each element, he or she will be precluded from obtaining a sentence reduction because his or her applicable guideline range will be based on his or her classification as a career offender, an alternate sentencing table, not the Crack Guidelines.<sup>42</sup>

With this legal framework in mind, the Overrepresentation Departure adds a wrinkle to the preceding authority. USSG § 4A1.3 grants a downward departure if a defendant’s criminal history has been over represented.<sup>43</sup> Essentially, if a “defendant’s criminal history category significantly over represents the seriousness of a defendant’s criminal history or the likelihood that the defendant will commit further crimes” then that defendant is entitled to a downward departure with respect to the sentencing guideline range.<sup>44</sup> Granting an Overrepresentation Departure has created an unresolved tension among the various appellate circuits. The circuits have been forced to resolve how a departure would affect a defendant’s right to a reduced sentence. Specifically, when a defendant is granted a departure, is that departure based on the applicable guideline range from the Crack Guidelines or the sentencing table because of his classification as a career offender? Whether the departure was based on the Crack Guidelines or the applicable guideline range from a defendant’s classification as a career offender will determine whether that defendant is entitled to a sentence reduction. Each conclusion produces a very different outcome. The outcome is determined by each circuit’s reading of the Sentencing Application Instructions.

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38. *Id.*

39. *Id.*; See also U.S.S.G. § 1B1.10(a)(2)(B) (2010).

40. *Munn*, 595 F.3d at 187.

41. U.S.S.G. § 4B1.1(a) (2010).

42. *Munn*, 595 F.3d at 188.

43. See U.S.S.G. § 4A1.3(b)(1) (2010).

44. See *Id.*; See also U.S.S.G. § 4B1.1(a) (2010).

The Eleventh and Second Circuits have shown consistency in addressing this issue. In *United States v. McGee*, the Second Circuit concluded that a defendant's sentence only has to be "based on" a subsequently amended guideline range.<sup>45</sup> The defendant, McGee, was classified as a career offender, but was granted an Overrepresentation Departure.<sup>46</sup> During the sentencing proceedings, the district court explicitly referenced the sentencing guidelines that would have applied absent the defendant being classified a career offender.<sup>47</sup> The Second Circuit reasoned that the fact that the sentencing Court took the "intermediate step of classifying McGee as a career offender" does not bar a sentence reduction.<sup>48</sup> Furthermore, the appellate court noted that there was strong indication that the sentence was based on the crack guidelines because the district court explicitly referenced those guidelines when determining McGee's sentence.<sup>49</sup>

Similarly, in *United States v. Moore*, the Eleventh Circuit has held that when a court grants an Overrepresentation Departure, a sentence reduction is "within the district court's discretionary authority."<sup>50</sup> Moreover, the Eleventh Circuit further noted that, if there is some "indication that the [sentencing] court based [the defendant's] sentence on the guideline range that would have applied absent the career offender designation," or any "basis for concluding that the reduction of [the applicable] base offense level lowered the sentencing range relied upon by the [sentencing] court in determining his sentence," the district court has the authority to reduce a defendant's sentence.<sup>51</sup>

Conversely, in *United States v. Tolliver*, the Eighth Circuit Court of Appeals reached a very different conclusion from the decisions in *Moore* and *McGee*. The facts in *Tolliver* are notably different from those in *Moore* and *McGee*, but the Eighth Circuit still addressed the unsettled issue presented by the effect of granting an Overrepresentation Departure. In *Tolliver*, the defendant was classified as a career offender, but was not subsequently granted an Overrepresentation Departure.<sup>52</sup> The Eighth Circuit held that the classification of Tolliver as a career offender precludes a sentence reduction, even if the sentencing court based Tolliver's sentence on the Crack Guidelines.<sup>53</sup> The Court explained that its interpretation of the Sentencing Application

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45. *United States v. McGee*, 553 F.3d 225, 228 (2d Cir. 2009).

46. *Id.* at 230.

47. *Id.* at 227.

48. *Id.* at 228.

49. *Id.* at 227.

50. *United States v. Moore*, 541 F.3d 1323, 1330 (11th Cir. 2008).

51. *Munn*, 595 F.3d at 189; *See also Moore*, 541 F.3d at 1330.

52. *United States v. Tolliver*, 570 F.3d 1062, 1064 (8th Cir. 2009).

53. *Id.* at 1066.

Instructions found that a defendant's applicable guideline was established after a district court determined the defendant's "corresponding guideline range as a career offender" but "before the court departed from that range."<sup>54</sup> As a result, the Eighth Circuit Court of Appeals concluded that because Tolliver's applicable guideline range was based on his classification as a career offender, the Eighth Circuit ruled that Amendment 706 did not apply.<sup>55</sup> Therefore, once a defendant has been classified as a career offender he cannot later be granted a sentence reduction.<sup>56</sup>

The *Munn* decision followed the reasoning in both the Second and Eleventh Circuits.<sup>57</sup> This reasoning adopted by these circuits is "a defendant's career offender designation does not bar a § 3582(c)(2) sentence reduction based on Amendment 706 if (1) the sentencing court granted an Overrepresentation Departure from the career offender guideline range, and (2) the court relied on the Crack Guidelines in calculating the extent of the departure."<sup>58</sup> This issue has yet to reach the United States Supreme Court, however, the reasoning provided by the Fourth, Eleventh, and Second Circuit "promotes the specific objective of Amendment 706: To provide relief to an offender who was disadvantaged by the Crack Guidelines."<sup>59</sup>

#### IV. ANALYSIS

The decision in *Munn* should be adopted by the United States Supreme Court to mend the split among the appellate jurisdictions. The Fourth Circuit's interpretation of the Application Instructions is accurate when determining the applicable guideline range for a defendant who is later granted an Overrepresentation Departure. In *Munn*, the Fourth Circuit noted that the Application Instructions were devised into chapters that are followed chronologically starting with Chapter 1.<sup>60</sup> In interpreting these instructions, the Fourth Circuit concluded that a defendant's applicable guideline range is ultimately calculated in Chapter 5.<sup>61</sup> This point even the government concedes.<sup>62</sup> The Overrepresentation Departure is contained in Part A of Chapter 4, which precedes a calculation of a defendant's applicable guideline range.<sup>63</sup> Therefore, if a defendant is granted a departure, his conviction would

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54. *Id.*

55. *Id.* at 1067.

56. *Id.* at 1066.

57. *Munn*, 595 F.3d at 192.

58. *Id.*

59. *Id.* at 195.

60. *See Munn*, 595 F.3d at 192.

61. *Id.*

62. *Id.*

63. *Id.*

not be predicated on his classification as a career offender, but instead his applicable guideline range in Chapter 5.<sup>64</sup> Any other interpretation of the Application Instructions would be illogical, complicated, and as the Fourth Circuit stated, “make little sense.”<sup>65</sup>

In analyzing any legal issue, the court cannot ignore the intentions of the legislative body charged with making the law. The reasoning and intent of both the legislative and judicial body must be uniform in an effort to create one strong united front. In the midst of settling the dispute of whether Munn’s applicable guideline range was based on the Crack Guidelines or his classification as a career offender, the Eighth Circuit seems to forget the very purpose Amendment 706 is to grant a sentence reduction. The overarching theme that Amendment 706 sought to remedy was the disparity of a defendant’s sentence based on a conviction for crack versus powder cocaine.<sup>66</sup> The United States Supreme Court noted that “[p]rior to Amendment 706, there was a 100-to-1 disparity between crack and powder cocaine (“co-caine”) offenses, resulting in sentences for crack offenses three to six times longer than for cocaine offenses involving equal amounts of drugs.”<sup>67</sup> The passage of this amendment had the effect of reducing “by two levels the base offense level assigned to each threshold quantity of crack listed in the Drug Quantity Table.”<sup>68</sup> Thus, this amendment reconciled the social discriminatory effect and the sentencing disparity between the crack and powder cocaine convictions. With the purpose of this amendment in mind, the defendants in *Munn*, *McGee*, *Moore*, and *Tolliver* were all convicted of distributing or using cocaine. As such, defendants who have been convicted of distributing or using cocaine should all be entitled to a reduced sentence or, at the very least, a district court having the jurisdiction to grant such a motion. Any other result perpetuates a grave inconsistency between those and future similarly situated defendants.

The split decisions between the circuits pose very different outcomes for defendants who have been convicted of crack related offenses. Assuming that a defendant meets the criteria to be entitled to Amendment 706, that defendant could either receive a reduction in the amount of time they are incarcerated or, in some situations, be released early from prison. Some courts have reduced months and in

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64. *Id.*

65. *Id.* (noting that it is not the intent of the legislature to have to first calculate, then later recalculate the applicable guideline range if the defendant was later classified as a career offender).

66. *Kimbrough*, 552 U.S. at 94 (2007) (explaining that the purpose of Amendment 706 was to remedy the sentencing disparity between crack and powder cocaine offenses).

67. *Munn*, 595 F.3d at 186,n.5.

68. *Id.*

some cases years off of a defendant's sentence.<sup>69</sup> This right granted by Amendment 706 is important to anyone incarcerated whether it was granting one day or one hour of early release. The defendants in *McGee*, *Moore*, and *Munn* were each entitled to this reduction, but the defendant in *Tolliver* was not. How do we reconcile this division with the defendant in *Tolliver*? Do we simply tell him that he should have committed his crime in the other jurisdictions? This dilemma explains the necessity for uniformity between each Circuit Court.

Lastly, the Fourth Circuit has already addressed the issue of ambiguity when the interpretation of a statute is uncertain. As previously mentioned, when there is ambiguity a court, such as the Eleventh Circuit, should be "obliged to apply the rule of lenity and resolve the conflict in the defendant's favor."<sup>70</sup> The precedent follows that the defendant in *Tolliver* should receive the benefit of Amendment 706, just like the defendants in the other jurisdictions. It is clear that some of the brightest legal minds are interpreting this statute differently. As such, the Fourth Circuit was correct in recognizing the potential fallout from a decision such as the one in *Tolliver* and correct in providing this sound argument to resolve any further debate to the contrary.

## V. CONCLUSION

The *Munn* decision must be followed by the United States Supreme Court and other appellate circuits that have and have not been presented with this controversial issue. The decision in *Munn* follows the legislative intent of the Sentencing Commission, which was to "provide relief to an offender who was disadvantaged by the Crack Guidelines."<sup>71</sup> If the reasoning in *Munn* is adopted, many prisoners convicted of crack related offenses, prior to the passage of Amendment 706, will be eligible for early release or a sentence reduction.<sup>72</sup> As such, the need for uniformity among the appellate circuits is absolutely critical to ensure that all similarly situated defendants are entitled to the same rights.

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69. *Kimbrough*, 552 U.S. at 100.

70. *Munn*, 595 F.3d at 194.

71. *Id.* at 195.

72. See *Kimrough*, 552 U.S. at 100 (explaining how a two level offense deduction could lead to a sentence reduction).