No. 15-30365

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM JOHN MAHAN,

Defendant-Appellant.

Appeal from the United States District Court

for the District of Oregon

Portland Division

OPENING BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

On May 7, 2015, William John Mahan filed a post-sentencing motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782 to the United States Sentencing Guidelines. ER 58-87. The district court had jurisdiction to decide the extent of its authority to reduce Mr. Mahan's sentence under 18 U.S.C. §§ 3231 and 3582(c)(2). The district court denied the motion in an opinion and order entered on November 4, 2015. ER 3-11. Mr. Mahan filed a motion for reconsideration on November 10, 2015, ER 19-23, that the district court denied on December 4, 2015, in an order that also extended the time to file a notice of appeal until December 18, 2015. ER 2. Mr. Mahan filed a timely notice of appeal on December 4, 2015. CR 162. This Court has jurisdiction to review the denial of the motion to reduce sentence under 18 U.S.C. § 3742(a)(1) and (2) and 28 U.S.C. § 1291.

STATEMENT OF ISSUES

After Mr. Mahan received a federal drug trafficking sentence, the Sentencing Commission promulgated a retroactive amendment to the guidelines that reduced the Drug Quantity Table by two levels. Mr. Mahan's original sentence included a downward variance from the Drug Quantity Table offense level that, in effect, ran the federal sentence concurrently with a state sentence served after the federal arrest and before the federal sentencing. The district court denied Mr. Mahan's motion to reduce his sentence on the grounds that the variance to credit the time in state custody did not constitute a concurrent sentence and that the retroactive policy statement rendered Mr. Mahan ineligible for a sentence reduction. The questions presented are:

> Because the variance functionally achieved a concurrent sentence, did the district court have authority under 18 U.S.C. § 3582(c)(2) and the retroactivity policy statement to incorporate the variance into a sentence reduction under the reasoning of *United States v. Drake*, 49 F.3d 1438 (9th Cir. 1995)?
>
> In the alternative, if "amended guideline range" in the retroactivity policy statement is interpreted to exclude variances that functionally achieve concurrency, does the policy statement violate statutory directives to avoid unwarranted disparity in imposing sentence because the duration of imprisonment would be dependent on irrelevant factors such as the timing and sequence of dual prosecutions?
>
> In the second alternative, does the retroactivity policy statement, if construed to require disparate treatment based on the mechanism used to achieve concurrency, violate the Due Process and Equal Protection Clauses because similarly situated defendants are treated differently based on arbitrary considerations?

STATEMENT OF THE CASE

Nature of the Case

This is the direct appeal from the denial of a motion to reduce sentence under 18 U.S.C. § 3582(c)(2) entered on November 4, 2015, by the Honorable Ann L. Aiken, United States District Judge for the District of Oregon. Because questions regarding concurrency are involved, this case is different from but related to other cases listed in the Statement of Related Cases that challenge the operation of retroactive amendments to the federal sentencing guidelines.

Relevant Facts And Procedural History

A. The Original Sentence Included a 20-Month Variance That Accounted For Time Served On A State Case.

On April 20, 2006, the government filed an indictment charging William Mahan with a single count of being a felon in possession of a firearm under 18 U.S.C. §§ 922(g) and 924(e). ER 503. On May 17, 2007, the government filed a superseding indictment adding a second count charging methamphetamine trafficking, in violation of 21 U.S.C. §841(a) and (b)(1)(C), and a third count charging possession of a firearm in furtherance of the drug crime, in violation of 18 U.S.C. § 924(c). ER 501. After a jury trial, Mr. Mahan was convicted on all counts.

The federal crimes occurred between November 29 and December 31, 2005. ER 12. On January 10, 2006, Mr. Mahan was arrested by state authorities on state

arrest warrants. SER 9. He was federally indicted three months later, on April 19, 2006, but remained in primary state custody serving other sentences until December 10, 2007. SER 5, 15-16. Because those 20 months of pretrial detention were credited against state sentences, the Bureau of Prisons would not count the time toward Mr. Mahan's federal sentence under 18 U.S.C. § 3585(b).

Counts 1 and 2 – the charges of being a felon in possession of a firearm and methamphetamine trafficking – were grouped for sentencing. SER 9.[1] Mr. Mahan's guideline range for those offenses was determined by reference to the Drug Quantity Table in the 2006 edition of the Guideline Manual. SER 10. The Court adopted the following guideline determinations from the presentence report:

Base Offense Level (20 to 35 grams of actual methamphetamine)	28
Total Offense Level	28
Criminal History Category	VI
Guideline Range	**140 to 175 months**

SER 19. The Count 3 conviction under § 924(c) required an additional five year consecutive sentence.

[1] The charged Armed Career Criminal Act enhancement under 18 U.S.C. § 924(e) on Count 1 was determined not to apply. ER 139.

At sentencing, the government argued that the judge should impose Mr. Mahan's federal sentence consecutively to his state sentences because they involved unrelated criminal conduct. ER 226-27, 457. The defense pointed out that Mr. Mahan had spent almost three years in pretrial custody without the potential to earn federal credit for much of that time:

> [T]hose two and a half, going on three years now that he spent in the Lane County Jail, almost all of that time is credited to the state sentence, and so I think his state sentence expired in December of last year. And so if the court were to sentence him today, he probably has about, I'm just guessing, less than a year in terms of time served towards the federal sentence.

ER 155. Because Mr. Mahan had made significant progress toward rehabilitation while in state custody, his attorney asked the court to reduce the sentence to give him "some credit" for the time in pretrial state custody. ER 155-56. A jail outreach volunteer confirmed Mr. Mahan's progress, saying that there had "been very few inmates" that he would be willing to speak out for, but that, "[i]n Mr. Mahan's case, he has been among the most responsive that I have worked with." ER 152-53. The volunteer said that Mr. Mahan had "shown a clear direction in his life" of change and had been working to help other prisoners. ER 153.

The sentencing judge concluded that the guideline range of 140 to 175 months appropriately represented the seriousness of the offense and the seriousness of Mr. Mahan's criminal history, but decided that "there is a need to account for the time

[he] sat over in the Lane County Jail." ER 170-71. The Court imposed a sentence of 120 months on the drug charge, which was 20 months below the guideline range, plus a mandatory consecutive sentence of 60 months on the § 924(c) charge. ER 14. The Court stated that the 20-month reduction was "fashion[ed]" as a variance, to "give[] you some benefit for the time that you already served." ER 171-72. The overall sentence imposed a total term of 180 months – 120 months on Counts 1 and 2, followed by 60 months on Count 3. ER 12. The Statement of Reasons cited § 3553(a) factors and reiterated that the sentence was adjusted to incorporate Mr. Mahan's pretrial state custody into his federal sentence: "Court adjusts sentence to allow some credit and benefit for time served that was applied to another sentence." SER 26.

B. After Mr. Mahan's Guideline Range Was Retroactively Reduced, He Requested A Sentence Reduction That Included The 20-Month Variance.

On November 1, 2014, Sentencing Guidelines Amendment 782 went into effect, retroactively reducing by two levels most of the base offense levels in the Drug Quantity Table set out at U.S.S.G. § 2D1.1(c). U.S.S.G. app'x C supp., 64-74 (2015). The amendment reflected a lessened emphasis on drug quantity in establishing offense culpability and was aimed in part at alleviating the "significant overcapacity" of the Bureau of Prisons. *Id.* at 73. Based on Department of Justice

testimony, the Commission believed that reducing offense levels would "enhance[e] public safety" by "permit[ting] resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts." *Id.* at 74.

Amendment 782 applies retroactively, U.S.S.G. § 1B1.10(d), and the parties agreed that the new Drug Quantity Table reduced Mr. Mahan's offense level by two as follows:

Amended Base Offense Level	26
Amended Total Offense Level	26
Criminal History Category	VI
Amended Guideline Range	**120 to 150 months**

ER 42-43, 67. Coincidentally, both Amendment 782's reduction to the low end of the guideline range and the length of the original variance are 20 months. Mr. Mahan asked the Court to reduce his drug sentence to 100 months, which would incorporate the 20-month variance to effect a sentence at the low end of the guideline range, consecutive to the 60-month § 924(c) sentence. ER 24, 67. The government opposed any reduction on jurisdictional grounds, contending that Mr. Mahan's sentence was

already at the low end of the "amended guideline range" and could not be further reduced. ER 40.

C. The District Court Found That It Lacked Jurisdiction To Grant The Requested Sentence Reduction Because The 20-Month Variance Did Not Implement A Concurrent Sentence.

In an order entered on November 4, 2015, the trial judge denied the motion to reduce sentence. ER 3. Judge Aiken found that the guidelines sentencing range was lowered and that "the government agrees defendant should be sentenced at the low end of defendant's new guideline range." ER 6. However, she accepted the government's argument "that defendant's 20-month reduction was a variance and does not qualify as an exception to the plain language of Amendment 782." *Id*.

The court rejected the defense position that the variance was based on concurrency. The judge reasoned that the variance was "not simply for time served, but also for the fact defendant had already made progressive steps in his treatment program." ER 8. The judge also explained that "defendant's state sanction was fully served prior to federal sentencing," so there was "no sentence to which the federal sentence could run concurrently." ER 8-9. The court concluded that the 20-month reduction "was, in fact, a variance," and therefore could not result in a reduction "below the end of his amended guideline range." ER 9. The judge found "nothing

unconstitutional about not allowing a sentence below the low-end of the amended guideline range for defendants who were already granted a variance." ER 10.

After accepting the government's position that the court did not have jurisdiction to grant Mr. Mahan a sentence reduction, the opinion included a statement indicating that "the court would impose the same sentence today," regardless of Amendment 782. ER 10. The court explained that it had fully considered "all the factors under 18 U.S.C. § 3553(a)" at the time of sentencing and found that a 120-month sentence was appropriate. *Id*. The defense moved for reconsideration of the statement regarding the court's intent to impose the same sentence today, relying on the opinions of this Court and the Supreme Court discouraging advisory rulings on issues not yet in controversy. ER 19-20. The defense also pointed out that the parties had solely contested jurisdiction, and so had not addressed factors relevant to the exercise of the court's discretion, including evidence of post-offense rehabilitation under *Pepper v. United States*, 562 U.S. 476, 491 (2011). ER 22. The trial court entered a minute order finding no basis for reconsideration and denying the motion. ER 2.

Standard of Review

This Court reviews de novo the petitioner's claim that the district court misinterpreted the Guidelines. *United States v. Swank*, 676 F.3d 919, 921 (9th Cir.

2012). This Court also reviews de novo questions of statutory and constitutional construction. *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012); *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (citing *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 405 (1990)).

Custody Status

Mr. Mahan is in custody at FCI Lompoc serving a 180-month sentence. His projected release date is January 4, 2021.

SUMMARY OF ARGUMENT

Mr. Mahan meets the criteria for a § 3582(c)(2) sentence reduction because Amendment 782 lowered his guideline range by two levels, from the previous range of 140 to 175 months, down to the new range of 120 to 150 months. The issues on appeal involve the extent of the permissible reduction. Initially, the question is whether the U.S.S.G. § 1B1.10(b)(2)(A) policy statement limiting reductions to the low end of the "amended guideline range" incorporates the 20-month variance to credit post-federal arrest time in state custody and, thus, permits a reduction to 100 months.

A variance to achieve a concurrent sentence does not change the length of the federal sentence. By subtracting the time served but not credited, the variance merely accounts for the gap created by the Bureau of Prisons' prohibition on credit for multiple sentences and constitutes one mechanism recognized by the Sentencing Commission to achieve concurrency. The portion of the sentence served concurrently is part of the overall sentence, as in *United States v. Drake*, 49 F.3d 1438 (9th Cir. 1995), where this Court held that a sentence adjusted for concurrency below 180 months met the fifteen-year mandatory minimum sentence. The limitation in the retroactivity policy statement against reductions to sentences below the "amended guideline range" permits the requested reduction to 100 months, because it incorporates the 20-month adjustment and effectuates a 120-month within-guideline sentence.

The judge's conclusion that the sentence was not concurrent is legally incorrect. The record clearly establishes that the judge intended the variance to grant "some credit" for time in state custody. SER 26. Federal sentencing principles established by the Supreme Court in *Setser v. United States*, 132 S. Ct. 1463 (2009), and by statutory and Guidelines provisions governing the mechanisms for implementing concurrent sentences, establish that sentencing judges have broad authority to impose federal sentences to run concurrently with any other sentence

served during pretrial custody, even if the other sentence is completed by the time of federal sentencing. The procedural mechanism used to achieve concurrency – whether denominated an adjustment, a variance, or a departure – is irrelevant so long as the effect is for the sentences to run together. The 20-month variance in this case functionally created a concurrent sentence because, as the district court stated, it was intended to credit Mr. Mahan's time in state custody that would not otherwise be credited toward his federal sentence. The fact that the variance was based in part on Mr. Mahan's treatment progress does not detract from that conclusion, because good pretrial conduct and other § 3553(a) factors are part of concurrent-consecutive decisions.

In the alternative, the district court's construction of the retroactivity policy statement to prohibit the 20-month variance would create an irreconcilable conflict between that portion of the guideline policy statement and the Sentencing Commission's statutory duty to ensure that the Guidelines meet the purposes of sentencing because it would institutionalize unwarranted disparities based on irrelevant factors such as the timing, length, and sequence of dual prosecutions. The construction of the retroactivity policy statement adopted by the district court therefore would also violate the Due Process and Equal Protection Clauses.

ARGUMENT

I. Because Variances To Achieve Concurrency Implement The Full Federal Sentence, The District Court Had Authority Under 18 U.S.C. § 3582(c)(2) And The Retroactivity Policy Statement To Incorporate The Variance In A Sentence Reduction.

The issues on appeal involve the intersection of two areas of statutory and guidelines law: the broad judicial authority to impose sentences to run concurrently or consecutively to other sentences; and the limited judicial power to grant sentence reductions based on retroactive amendments to the sentencing guidelines. Contrary to the district court's conclusion, sentencing judges have power to grant concurrency for all time in custody after the federal arrest, and that power does not depend on the procedural mechanism to achieve credit against the federal sentence – whether it be by departure, variance, adjustment, or prospective judgment. The requested sentence reduction to 100 months in this case would effect a full federal sentence of 120 months by incorporating 20 months of concurrent state custody time. Therefore, the requested reduction is within the "amended guideline range" as required by U.S.S.G. § 1B1.10(b)(2)(A).

A. When A Defendant's Guideline Range Has Been Lowered By A Retroactive Guideline Amendment, Courts Have Authority To Reduce The Defendant's Sentence To The Low End Of The "Amended Guideline Range."

Under 18 U.S.C. § 3582(c)(2), district courts have discretion to reduce an imposed sentence "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission[.]" Appendix 11. The § 3582(c)(2) sentence reduction is discretionary, but the reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." The Guidelines' policy statement, U.S.S.G. § 1B1.10, instructs courts to "determine the amended guideline range that would have been applicable to the defendant if the [retroactive] amendment(s) to the guideline . . . had been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b)(1). Other than substituting the retroactive amendment for the corresponding guideline provision, the court should "leave all other guideline application decisions unaffected." *Id.*

Before 2011, the guideline policy statement permitted courts to adhere to previously granted variances and departure decisions. U.S.S.G. § 2D1.1 (2010). By amendment in 2011, the Sentencing Commission purported to limit most reductions to the low end of the "amended guideline range," which the commentary described

as excluding departures and variances. U.S.S.G. app'x C, vol. III, 416-422 (2015) (Amendment 759).

The parties in this case agreed that Mr. Mahan meets the initial requirement for a sentence reduction because Amendment 782 reduced his applicable guideline range. The dispute centers on whether the provision limiting reductions to the minimum of the "amended guideline range" includes the 20-month variance to grant credit for time in state custody.

B. The Sentencing Judge Has Statutory And Inherent Authority To Run Sentences Concurrently With Other Sentences, Including By Subtracting Periods Of Uncredited Post-Arrest Imprisonment To Implement The Full Federal Sentence.

The federal sentencing judge's power to impose a federal sentence to run concurrently with another undischarged sentence is codified in part in 18 U.S.C. § 3584. Appendix 2. In addition, the Supreme Court held in *Setser v. United States* that federal sentencing judges have inherent authority beyond the statutory language to impose sentences concurrently or consecutively. 132 S. Ct. 1463 (2009) (federal judge had inherent authority to impose sentence consecutively to a yet-to-be-imposed state sentence). In *Setser*, the Court held that § 3584(a) assumes preexisting judicial authority to make concurrent-consecutive decisions because the statute does not contain "an implied 'only,'" exclusively defining judicial authority. 132 S. Ct. at 1469-70. The judicial power to run a prior sentence concurrently is also not cabined

by the guidelines. *United States v. Wills*, 881 F.2d 823, 826 (9th Cir. 1989) ("If the guidelines are to be consistent with Title 18, the discretion [to impose sentences consecutively or concurrently] cannot be taken away."); *accord United States v. Pedrioli*, 931 F.2d 31, 32 (9th Cir. 1991). The decision regarding concurrency "concerns a matter of discretion traditionally committed to the Judiciary." *Setser* 132 S. Ct. at 1468.

The Bureau of Prisons interprets its sentence computation statutes to foreclose crediting time in pretrial custody that has been credited against another sentence. 18 U.S.C. § 3585(b) (Appendix 3). This rule extends to periods of custody following the commission of the federal offense that would otherwise be counted. *Id*. As a result, this Court and the Sentencing Commission have recognized that implementing a judicial determination of concurrency requires different mechanisms depending on the timing of the prosecution in each jurisdiction, some of which involve subtracting the uncredited custody time to implement the full federal sentence. *See Drake*, 49 F.3d at 1440-41; U.S.S.G. §§ 5G1.3, 5K2.23.

For example, U.S.S.G. § 5G1.3(b) applies when the other sentence is imposed for relevant conduct and remains undischarged at the time of federal sentencing.

Appendix 4-9.[2] The provision calls for the federal sentence to be "adjusted" down by the amount of pretrial custody on the undischarged sentence that will not be credited by the Bureau of Prisons. U.S.S.G. § 5G1.3(b). Similarly, U.S.S.G. § 5G1.3(c) provides that the sentencing judge may impose a federal sentence "concurrently, partially concurrently, or consecutively" to an undischarged sentence for unrelated conduct. Where the earlier state sentence has been discharged, U.S.S.G. § 5K2.23 provides that a "downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment, and (2) subsection (b) of 5G1.3 . . . would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense." Appendix 10.

These provisions recognize that the time subtracted from the federal term of imprisonment to achieve the result of concurrency should be counted as part of the

[2] Mr. Mahan provides the current versions of U.S.S.G. §§ 5G1.3 and 5K2.23, which differ slightly from the versions in the 2006 Guideline Manual applied at Mr. Mahan's sentencing, to demonstrate the general proposition that the Sentencing Commission recognizes various mechanisms to achieve concurrency and that time subtracted from the federal sentence for that purpose is counted as part of the full federal term. U.S.S.G. § 5G1.3 is oft-amended. Appendix 9. The particulars of the provisions in effect at the time of sentencing do not cabin the judicial authority to impose a concurrent sentence, *Wills*, 881 F.2d at 826, nor are they pertinent to whether the sentence is, in fact, concurrent.

full federal sentence. *See* U.S.S.G. § 5G1.3(b) (2012), cmt. n.2(D) (explaining that a federal judge would impose a seven-month term of imprisonment to implement a 13-month guideline sentence concurrently with six months already served on a state sentence). Given that the guidelines have been advisory since 2005, the mechanisms for achieving concurrency suggested by the Sentencing Commission, as well as the circumstances in which the guidelines call for them to be applied, are not exclusive. *See Booker v. United States*, 543 U.S. 220, 244 (2005) (opinion of Justice Breyer construing the guidelines to be advisory).

Pre-*Booker*, this Court recognized that time subtracted to achieve concurrency constitutes part of the overall federal sentence. *Drake*, 49 F.3d at 1440-41 (sentence adjusted below 180 months to achieve concurrency complied with the mandatory minimum fifteen-year sentence). The defendant in *Drake* was determined to be an Armed Career Criminal, and the parties agreed to a sentence of 188 months for his unlawful possession of a firearm, slightly above the 180-month mandatory minimum. At the time of his federal sentencing, the defendant had served 12 months of a 66-month state sentence for related conduct. The sentencing court agreed that the federal and state sentences should run concurrently because they involved related conduct, but the court refused to adjust Drake's federal sentence by the 12 months

served in state custody on the grounds that the adjustment would result in a sentence below the 180-month mandatory minimum. 49 F.3d at1441.

This Court reversed, holding that the district court was required to "reduce Drake's mandatory minimum sentence for the time Drake served in Oregon prison." *Id.* at 1441. The Court explained that the resulting sentence – even though below 180 months – would meet the mandatory minimum requirement because it included the concurrent time in state custody as part of the sentence of imprisonment. *Id*. at 1440. The Court concluded that "[t]o hold otherwise would 'frustrate the concurrent sentencing principles mandated by other statutes.'" *Id*. at 1441. The *Drake* opinion confirms that an adjustment to account for time previously served on another sentence is one method of achieving concurrency, and that such time is counted as part of the full federal sentence.[3]

Combined, these principals establish that federal sentencing judges have broad inherent judicial authority to impose concurrent sentences that is not cabined by statute or Guideline. Moreover, regardless of the mechanism used to implement

[3] The Bureau of Prisons has recognized that adjustments for state credit are part of the term of imprisonment by acknowledging that courts can grant variances for good time credits that would have been earned during the adjusted time, thereby avoiding unwarranted disparity among similarly-situated defendants. Respondent-Appellee's Answering Brief at 30, *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011) (No. 10-35792), 2011 WL 991513.

the concurrency decision, whether by adjustment, departure, or variance, the sentence has not been decreased; it has simply been deemed to run at the same time as another sentence. BLACK'S LAW DICTIONARY, 1569 (10th ed. 2014) (defining "concurrent sentences" as "[t]wo or more sentences of jail time to be served simultaneously."). Accordingly, the adjusted time constitutes part of the full federal sentence.

C. The Original Sentence Imposed In This Case Achieved A Concurrent Sentence.

The sentencing transcript and the district court's statement of reasons confirm that the court intended the 20-month variance to credit state time against the federal sentence. *See* ER 170 (stating that sentence was intended "to account for the time you have sat over in the Lane County Jail"); SER 26 ("Court adjusts sentence to allow some credit and benefit for time served that was applied to another sentence."). Without the adjustment, the Bureau of Prisons would not credit Mr. Mahan with the time in state custody under § 3585(b), and the 140-month sentence would have been de facto consecutive to the state term, resulting in a total of 160 months of imprisonment from the time of arrest.

The district court provided two reasons for its conclusion that Mr. Mahan's sentence was not concurrent, neither of which is legally correct. First, the court stated that the sentence was a "variance" that was "not simply for time served, but also for

the fact defendant had already made progressive steps in his treatment program." ER 6. But consideration of rehabilitation is a routine part of the decision whether sentences should run concurrently. *See* 18 U.S.C. § 3584(b) (requiring courts to consider "the factors set forth in section 3553(a) when making the concurrent-consecutive decision); U.S.S.G. §5G1.3, cmt. n.4 (referring to same considerations); U.S.S.G. § 5K2.23 (departure should be determined "to achieve a reasonable punishment for the instant offense"). The district court judge implied a false dichotomy in which a "variance" cannot also be a concurrent sentence. Time subtracted from the federal sentence through any mechanism implements a concurrent sentence when its effect is to account for uncredited time in post-offense pretrial custody.

Second, the district court concluded that Mr. Mahan's federal sentence could not, in fact, have been concurrent because the state sentence was already completed when the federal sentence was imposed. ER 3-4. The district court's reasoning underlying that conclusion was flawed because the inherent power to impose concurrent sentences, which by definition require only simultaneous service of time in state custody, extends to all time in pretrial custody following the federal offense. BLACK'S LAW DICTIONARY at 1569. Although the term "undischarged" appears in the statutory concurrent-consecutive authority, and in concurrency granted through

U.S.S.G. § 5G1.3, *Setser* established that inherent judicial authority regarding concurrency is broader than the statute. Further, U.S.S.G. § 5K2.23 recognizes that similar considerations apply to discharged sentences. *See also* 18 U.S.C. § 3585(b)(2) (if not credited against another sentence, the defendant shall receive credit "for any time he has spent in official detention" "as a result of any other charge for which the defendant was arrested after commission of the offense for which the sentence was imposed").

And there exists no reason why the total length of a defendant's incarceration should depend on whether the federal case proceeded quickly enough for the earlier sentence to be "undischarged." Otherwise, a defendant who has spent three years in pretrial custody would be eligible for concurrency if the earlier imposed sentence was three years and one month, but would necessarily receive a consecutive sentence, meaning years longer in prison, if the earlier sentence was two years and eleven months. *See Lockhart v. United States*, No. 14-8358, 2016 WL 782862, *6 (U.S. Mar. 1, 2016) (stating that "no reason" exists to impose different punishment for defendants with "nearly identical" prior offenses).

In sum, the district court provided no basis to contradict the conclusion that the variance represented an exercise of judicial authority to impose the federal

sentence concurrently with the state sentences served during pretrial custody on the federal offense.

D. The Plain Meaning Of "Amended Guideline Range" To Include Concurrency Avoids Serious Constitutional Problems.

The policy statement on retroactive amendments, U.S.S.G. § 1B1.10, prevents sentence reductions to "a term that is less than the minimum of the amended guideline range." The words "term" and "amended guideline range" should be interpreted to incorporate the mechanisms used to implement concurrency. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (statutory interpretation depends on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole") (quoting *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997)). Based on the above reasoning, the federal sentence includes uncredited custody time subtracted to achieve an overall reasonable sentence. To the extent the policy statement does not expressly incorporate concurrency jurisprudence, the Court should resolve ambiguity in favor of Mr. Mahan based on the doctrine of constitutional avoidance and the rule of lenity.

Constitutional avoidance requires courts to adopt any "fairly possible" construction of a statute that avoids serious constitutional concerns. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (reading an "implicit" six-month limitation into a statute that would have otherwise authorized indefinite immigration detention);

United States v. Buckland, 289 F.3d 558, 564-65 (9th Cir. 2002) (en banc) (interpreting drug statute to require jury finding of drug quantity). The doctrine of constitutional avoidance applies to policy statements in the federal sentencing guidelines. *See United States v. Watts*, 910 F.2d 587, 592 (9th Cir. 1990).

The rule of lenity applies to resolve ambiguity in the defendant's favor "where text, structure, and history fail to establish that the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994). The rule of lenity requires that an ambiguous statute be construed narrowly to avoid an unjust and unintended punishment. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (If any ambiguity were to survive, "we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity."); *United States v. Bass*, 404 U.S. 336, 348 (1971) ("This policy [of resolving ambiguous statutes in favor of lenity] embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'").

Here, the limitation in § 1B1.10(b)(2)(A) does not expressly or impliedly address procedural mechanisms – in whatever form – necessary to implement a concurrent, within-guideline sentence. The limitation should be construed in the defendant's favor under the rule of lenity and to avoid running afoul of the Constitution.

E. Because The Requested 100-Month Sentence Incorporates 20 Months Of State Time, The Reduced Sentence Would Fall Within An Amended Guideline Range Of 120 To 150 Months.

Because the sentences were intended to run concurrently – at the same time – whether by variance, adjustment, or departure, a sentence reduction to 100 months would incorporate the same 20-months of state custody time and, thus, would effectuate a 120-month federal sentence – a sentence within the amended guideline range proposed by the government. Just as *Drake* held that a sentence can meet a statutory mandatory minimum by incorporating time served in state custody, the 100-month requested sentence in this case is within the "minimum of the amended guideline range" because it incorporates the 20 months served in state custody.

In a similar case, a district court incorporated a state-time adjustment when reducing the defendant's term of imprisonment under § 3582(c)(2) to avoid an "inequitable" result. *United States v. Malloy*, 845 F. Supp. 2d 475, 484 (N.D.N.Y. 2012). Like Mr. Mahan, the defendant in *Malloy* had violated his state parole as a result of the conduct underlying his federal arrest. Mr. Malloy was under a parole hold pending a violation hearing at the time he was sentenced in federal court. At sentencing, the parties agreed that the defendant should receive credit for the parole violation sentence. Although the defendant's guideline range was 120 to 150 months, the court "imposed a term of imprisonment of 100 months, which included

a 20-month custody credit." *Id*. at 478. The court "never definitively stated the basis for the custody credit—that is, whether it applied U.S.S.G. § 5G1.3(b) or U.S.S.G. § 5K2.23"—and there was some question as to whether the state term was discharged or undischarged. *Id*. at 481.

After his sentence became final, Mr. Malloy sought a sentence reduction based on retroactive amendments to the crack cocaine guidelines that reduced his guideline range to 84 to 105 months. *Malloy*, 845 F. Supp. 2d at 480. The district court granted a reduction that included the 20-month adjustment and imposed a new sentence of 64 months. *Id*. at 484-85. The court explained that, regardless of whether the initial adjustment was made pursuant to § 5G1.3 or § 5K2.23 (*i.e.*, regardless of whether the sentence was discharged or undischarged), it was appropriately applied after the retroactive amendment because "it has no effect on Malloy's amended guideline range, and is being utilized solely to ensure Malloy receives the credit he was previously granted. . . . A contrary result would be, simply put, inequitable." *Id*. at 484.

The present case similarly requires incorporation of the 20-month variance into the reduced sentence. The purpose of the initial adjustment, as in *Malloy*, was not to reduce Mr. Mahan's 140-month recommended guideline sentence, but to allow that sentence to run at the same time as the state sentences. As the district court

concluded in *Malloy*, incorporating the 20-month variance would not place Mr. Mahan's reduced sentence below the amended guideline range; it would simply preserve the credit he already received. As in *Malloy*, denial of Mr. Mahan's concurrency adjustment would be inequitable.

F. The Court's Remedy Should Include Remand With Instructions To Exercise Discretion To Grant A Sentence Reduction Of Up To 20 Months Without Prejudice Or Consideration Of The Prior Advisory Statement.

The defense recognizes that there is no right to a sentence reduction under Amendment 782, which incorporates the instruction in § 3582(c) that district courts shall decide whether to grant a reduction, and by what extent, based on consideration of the sentencing factors listed in 18 U.S.C. § 3553(a). 18 U.S.C. § 3582(c)(2). Those factors include post-offense rehabilitation, which the Supreme Court recognized is highly relevant to most of the § 3553(a) factors, including rehabilitation that occurs between the time of the original sentence and the new sentencing decision. *Pepper*, 562 U.S at 491. In denying relief, without briefing from the parties regarding the court's exercise of discretion, as opposed to the court's jurisdiction, and without factual development of Mr. Mahan's rehabilitation following the time of the original sentence, the trial judge provided an advisory opinion regarding how sentencing discretion would be exercised today. ER 10 ("Given [§3553(a) factors] and

regardless of Amendment 782 to the U.S.S.G., the court would impose the same sentence today.").

If the Court agrees the sentencing judge had jurisdiction to consider the sentence reduction motion, the Court should include in its remand order the instruction that the district court should exercise its discretion in the first instance without prejudice from the advisory opinion. This Court has disapproved of advisory statements that a court would impose the same sentence, regardless of a change in the guideline range, after an appeal:

> A district court's mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial determination of the correct Guidelines range. The court must explain, among other things, the reason for the extent of a variance. *Carty*, 520 F.3d at 991–92. The extent necessarily is different when the range is different, so a one-size-fits-all explanation ordinarily does not suffice.

United States v. Munoz-Camarena, 631 F.3d 1028, 1031 (9th Cir. 2011); *see also United States v. Gardenhire*, 784 F.3d 1277, 1284 (9th Cir. 2015) ("district court's post-hoc statement that it would impose the same sentence even if reversed by the Ninth Circuit does not render the procedural error harmless" even when judge cited 18 U.S.C. § 3553(a) factors). Similarly, in the present case, the statement that the same sentence would be imposed "regardless of Amendment 782" inadequately accounts for the correct guideline range operating as "the starting point and initial

benchmark." *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Munoz-Camarena*, 631 F.3d at 1030 (quoting *Gall*, 552 U.S. 50 n.6).

The trial court's statement failed to follow the principle of party presentation: the Judiciary relies "on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). The parties in the present case presented and litigated the question of jurisdiction. The defense did not present argument regarding prison performance and other reasons why exercise of ameliorative discretion should be exercised. The trial court's advisory opinion could not have been fully considered because the necessary post-offense rehabilitation facts were not presented. Further, once jurisdiction is established, the parties may agree that a sentence reduction is appropriate. ER 20-21.

Once the sentencing judge ruled that no jurisdiction existed, the additional statement regarding how sentencing discretion would be exercised became an unconstitutional advisory opinion. "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions." *U.S. Nat'l Bank of Oregon v.*

Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). If this Court's ruling establishes jurisdiction, the defendant should have the opportunity to request the exercise discretion and to present new facts supporting a sentence reduction. The government will have the opportunity to agree, partially agree, or oppose, after which the sentencing judge should act in the neutral capacity of deciding the ripe issue on a clean slate.

II. In The Alternative, The District Court's Interpretation Of "Amended Guideline Range" In U.S.S.G. § 1B1.10(b)(2)(A) To Exclude Concurrency Adjustments Conflicts With Statutory Directives To Avoid Unwarranted Disparity In Imposing Sentence By Treating Defendants Differently Based On The Sequence And Timing Of Dual Prosecutions.

If U.S.S.G. § 1B1.10(b)(2)(A) prevents adjustments intended to effect concurrent sentences, then it conflicts with Congress's statutory directive in 28 U.S.C. § 991(b) that "sentencing policies and practices" meet the purposes of sentencing and avoid unwarranted sentencing disparity. The Sentencing Commission is required by statute to establish sentencing practices that (1) "assure the meeting of the purposes of sentencing as set forth in § 3553(a)(2)," and (2) "provide certainty and fairness in meeting the purposes of sentencing," including "*avoiding unwarranted sentencing disparities*" among similarly-situated defendants and "maintaining sufficient flexibility to permit individualized sentencing decisions." 28 U.S.C. § 991(b) (emphasis added). Policy statements that are

inconsistent with the Sentencing Commission's originating statutes are invalid. *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (the Sentencing Commission's broad discretion to formulate guidelines "must bow to the specific directives of Congress"); *Stinson v. United States*, 508 U.S. 36, 38 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.").

A. Adjustments To Effect Concurrent Sentences Are Necessary To Meet The Purposes Of Sentencing.

The process for imposing a sentence is well-established. *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). A court must first correctly calculate the applicable guideline range, and then consider the non-guideline factors set forth in § 3553(a) to impose a sentence "sufficient, but not greater than necessary" to meet the purposes of sentencing. *Gall v. United States*, 552 U.S. 38, 50 (2007). Even when courts grant a downward departure or variance, the guideline range serves as the "starting point and the initial benchmark" for determining the "sufficient, but not greater than necessary" sentence. *Id*. A judge imposing an outside-guideline sentence must "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Carty*, 520 F.3d at 991 (quoting *Gall*, 552 U.S. at 47).

In addition to the guideline range and other factors, § 3553(a) requires courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The concurrency statute, 18 U.S.C. § 3584(b), expressly requires courts to consider the § 3553(a) factors when deciding whether sentences should be concurrent or consecutive. Thus, when a court imposes a concurrent sentence, it does so to meet all of the required purposes of sentencing.

B. The 2011 Amendment To U.S.S.G. § 1B1.10(b)(2)(A) Diverged From The Sentencing Commission's Historical Policy Of Encouraging Adherence To All Original Sentencing Decisions When Applying A Retroactive Guideline Amendment.

Up until November 1, 2011, the Sentencing Commission through its policy statement in U.S.S.G. § 1B1.10, encouraged courts to adhere to prior sentencing decisions, including guideline departures and variances, when implementing retroactive guideline amendments. For example, the provision originally instructed courts to consider the sentence that it "would have imposed" had the amended guideline been in effect at the time of sentencing. *See* U.S.S.G § 1B1.10(b) (2006); U.S.S.G. § 1B1.10(b) (1989). The Commission expanded the provision in 1994 by removing a restriction against reductions that "exceed the number of months by which the maximum of the guideline range . . . has been lowered." U.S.S.G. app'x C, vol. I, 414-15 (2015) (Amendment 504). In 1997, the Commission made explicit

that, "[w]hen the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate." U.S.S.G. § 1B1.10, cmt. n.3 (1997); U.S.S.G. app'x C, vol. I, at 503-04 (Amendment 548).[4]

As amended in 2008, with the first retroactive reduction to the crack cocaine guidelines, the Sentencing Commission suggested caution in adhering to variances from the guideline range, but did not purport to limit sentencing courts' authority:

> If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

U.S.S.G. § 1B1.10(b)(2)(B) (effective March 3, 2008). Courts exercising that authority frequently retained variances unless the reason for and extent of the variance was accounted for by the retroactive amendment. *See*, *e.g.*, *United States v. Wilkerson*, No. 00-CR-10426-MLW, 2010 WL 5437225, *2 (D. Mass. Dec. 23, 2010) (granting comparable reduction because initial variance was not based on crack/powder disparity); *United States v. Reid*, 566 F. Supp. 2d 888, 894-95 (E.D.

[4] In *Booker*, the Court interpreted the Sentencing Guidelines to be advisory, not mandatory, which led to variances as well as departures from guideline ranges. 543 U.S. at 259.

Wis. 2008) ("If the departure or variance failed to account for the crack/powder disparity, a further reduction would . . . more likely be warranted," but "if . . . the court accounted for the disparity, a further reduction . . . may not be warranted.").

The Sentencing Commission for the first time purported to prohibit variances and most departures by amendment in 2011. While seeking comment on whether the most recent amendments to the crack cocaine guidelines should be made retroactive, the Commission asked whether it should "provide further guidance or limitations" to courts about "the circumstances in which and the amount by which sentences may be reduced." 76 Fed. Reg. 24960, 24973 (May 3, 2011). The Commission expressed concern that it "should account for" the expanded "discretionary authority of a sentencing court to impose a sentence outside the guidelines framework." 76 Fed. Reg. at 24973-74.

At the public hearing on the retroactivity of the crack amendment, it became clear that the Commission's concern was preventing defendants whose sentencing judges had already varied based on a policy disagreement with the crack cocaine guidelines from receiving a windfall. The commissioners asked, for example, why an amendment to the guideline range should affect a sentence imposed by a judge

who "ignored" the guideline range.[5] Both the defense bar and the Department of Justice advised that judges were legally required to consider the guideline range, that departures on the basis of policy disagreements with the Guidelines were rare, and that the parties and judges were already addressing the issue when it did arise.[6]

A Justice Department representative testified that judges varied for policy reasons only to a small degree in "a very narrow class of cases" and that the Department would not object to sentence reductions in other types of cases, such as departures for overstated criminal history or variances for medical or mental health conditions.[7] The stakeholders never suggested that the Commission should preclude or limit reductions for defendants who had received variances or departures from the guideline range for individualized reasons, much less that the limitation should extend to adjustments imposed to achieve concurrent sentences.

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[5] Transcript of Public Hearing Before the U.S. Sentencing Commission at 108 (June 1, 2011).

[6] *See id*. at 49-52, 59-60, 61-62, 93, 101-12; Statement of Michael Nachmanoff on Behalf of the Federal Public and Community Defenders Before the U.S. Sentencing Commission at 24-26 (June 1, 2011); Testimony of David Debold on Behalf of the Practitioners Advisory Group at 7-8 (June 1, 2011).

[7] Transcript of Public Hearing Before the U.S. Sentencing Commission at 51, 59-60.

On July 13, 2011, the Commission, without opportunity for public comment, amended the retroactivity policy statement to be more restrictive than the defense bar or the Department of Justice urged, providing that district courts could no longer reduce a sentence below the minimum of the amended guideline range except to account for substantial assistance departures. 76 Fed. Reg. 41332 (July 13, 2011). Although the policy statement does not further define the "amended guideline range," the commentary assumes that it excludes departures and variances. U.S.S.G. § 1B1.10, cmt. n.3. Neither the text of the policy statement nor the commentary explicitly mentions adjustments to effect concurrent sentences.

By way of explanation, the Commission asserted that its previous rule, distinguishing between pre-existing departures (where a further retroactive reduction from the guideline range "may be appropriate") and variances (where further retroactive reductions "generally would not be appropriate"), had been "difficult to apply and ha[d] prompted litigation." *Id*. The Commission stated that it decided to adopt "a single limitation applicable to both departures and variances," in order to "avoid[] undue complexity and litigation" and "avoid unwarranted sentencing disparities[.]" *Id*. at 41334. The Commission exempted from the limitation defendants who had received departures for providing substantial

assistance, who the Commission felt were "differently situated from other defendants." *Id*.

C. Interpreting "Amended Guideline Range" In § 1B1.10(b)(2)(A) To Negate Concurrency Adjustments Would Conflict With § 991(b)'s Directive To Meet The Purposes Of Sentencing And Avoid Unwarranted Disparity.

A retroactive sentence reduction under 18 U.S.C. § 3582(c) is not a "plenary resentencing proceeding" requiring courts to reweigh the § 3553(a) factors. *United States v. Tercero*, 734 F.3d 979, 983 (9th Cir. 2013). In *Dillon v. United States*, the Supreme Court denied a defendant's request that, in applying the 2008 retroactive crack guideline amendment, the court consider variances that had not previously been available because he had been sentenced before *Booker*. 560 U.S. 817 (2010). The Court held that the district court could not reconsider aspects of the sentence other than the guideline amendment because "§ 3582(c) does not authorize a sentencing or resentencing proceeding." *Dillon*, 560 U.S. at 825. The Court found that § 1B1.10(b)(1) requires the court to substitute the new guideline for the old one and "leave all other guideline application decisions unaffected." *Dillon*, 560 U.S. at 831.

But if the new limitation in § 1B1.10(b)(2) prohibits courts from maintaining the sentencing court's original determination to impose a concurrent sentence, or the functional equivalent of a concurrent sentence, then it undoes a significant guideline

application decision and it changes the relationship of the sentence to the pertinent § 3553(a) factors. The limitation would, in effect, require a concurrent sentence to become a consecutive sentence, despite the sentencing court's original determination that a concurrent sentence would better meet the purposes of sentencing.

For example, imagine three defendants who were each arrested on the same day for the same offense and held in custody for the same period of time. Each defendant fell within Offense Level 28 and Criminal History Category VI for a guideline range of 140 to 175 months. While the federal case was pending, Defendants B and C each served a 20-month state sentence. The sentencing court determined that all three defendants should receive a low-end sentence of 140 months. Defendant A had no prior sentence and received a sentence of 140 months. Because Defendant B actively sought treatment during his state pretrial custody, the court decided to impose his federal sentence concurrently with his state sentence. Therefore, the court incorporated the 20 months of state custody time and adjusted his term of imprisonment to 120 months. Defendant C did not seek treatment, and the court decided to impose his federal sentence consecutively to his state sentence. Therefore, the court imposed a sentence of 140 months without variance, departure, or adjustment. As the sentences were originally imposed, accounting for 3553(a)

factors, Defendants A and B, would serve roughly the same amount of time, whereas Defendant C would serve about 20 months longer.

Pursuant to Amendment 782, each defendant's guideline range was lowered by 20 months, from 140 months to 120 months. If § 1B1.10 prohibits the court from retaining the concurrency adjustment, Defendants A and C would be eligible for a full 20-month reduction, while Defendant B, who sought treatment, would be eligible for no reduction, thereby transforming his concurrent sentence into a de facto consecutive sentence. As a result, Defendant B would serve 20 months more than Defendant A, even though the sentencing court originally determined under § 3553(a) that the same amount of incarceration was warranted. And Defendant C, who did not seek treatment, would be eligible to receive the same sentence as Defendant B. The following tables summarize the irrational results:

ORIGINAL SENTENCE			
	State Sentence	**Federal Sentence**	**Total Sentence**
Defendant A	0	140	140
Defendant B	20	120 (concurrent)	140
Defendant C	20	140 (consecutive)	160

AMENDMENT 782 SENTENCE ELIGIBILITY			
	State Sentence	**Federal Sentence**	**Total Sentence**
Defendant A	0	120	120
Defendant B	20	120 (consecutive)	140
Defendant C	20	120 (consecutive)	140

In short, construing § 1B1.10's limitation in that manner would replace warranted disparity with unwarranted disparity. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (interpreting the statutory scheme to treat minor offenders more harshly than more serious offenders "makes scant sense" and leads to "consequences Congress could not have intended"). By changing the initial guideline benchmark for each of the defendant's sentences, but effectively canceling the individualized determination of concurrency which is based on 3553(a) factors, the limitation would conflict with the Sentencing Commission's statutory directive in 28 U.S.C. § 991(b) to promote certainty and fairness, avoid unwarranted sentencing disparity, and account for individual mitigating and aggravating factors.

III. In The Second Alternative, The District Court's Interpretation Of U.S.S.G. § 1B1.10(b)(2)(A) Violates The Due Process And Equal Protection Clauses Because It Irrationally Makes Sentence Reductions Dependent On The Mechanism Used To Effect Concurrent Sentences.

Irrational and arbitrary classifications violate the Equal Protection Clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991); *United States v. Trimble*, 487

F.3d 752, 754 (9th Cir. 2007). Laws that draw distinctions between classes will be upheld if the distinction is rationally related to a legitimate state interest, but the state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985)). If construed to prohibit concurrency adjustments, U.S.S.G. § 1B1.10(b)(2)(A) would create two classes of prisoners who are treated differently: those whose concurrency was achieved without adjustment and those whose concurrent sentences required an adjustment. Whereas the original concurrency decision must be based on 3553(a) factors, the new classification would make a defendant's eligibility for a full, two-level sentence reduction depend on a variety of arbitrary factors that determine whether and to what extent an adjustment is required to effect a concurrent sentence: whether the defendant was first in state or federal custody, whether the pretrial custody was credited toward a state sentence, and the length of state custody before federal transfer.

A. By Varying The Length Of Custody Based On The Timing And Sequence Of Dual Prosecutions, The District Court Injected Arbitrary And Irrational Grounds For Determining The Actual Time Of Custody For The Federal Sentence.

This Court recognizes that equal protection considerations prohibit arbitrarily denying presentence custody credit to certain classes of prisoners. *Jonah R. v.*

Carmona, 446 F.3d 1000, 1008 (9th Cir. 2000) (irrational to provide presentence credits to adults but not juveniles); *Myers v. United States*, 446 F.2d 232, 234 (9th Cir. 1971); *see Dunn v. United States*, 376 F.2d 191 (4th Cir. 1967) ("Denial of credit . . . where others guilty of crimes of the same or greater magnitude automatically receive credit, would entail an arbitrary discrimination within the power and hence the duty of the court to avoid."). The Supreme Court, when faced with an argument that pretrial credit should depend on when the sentence was imposed, found that such an interpretation would render the statute "arbitrary." *United States v. Wilson*, 503 U.S. 329, 334 (1992) ("We can imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in prison, to depend on the timing of his sentencing."); *see also Lockhart*, 2016 WL 782862, at *6 (seeing "no reason" why sentence should be enhanced differently based on "nearly identical" prior convictions).

A court that has imposed a concurrency adjustment has necessarily found that the defendant should not serve the length of the federal sentence *added* to the prior sentence, but instead should serve them both at the same time. There is no reason why § 1B1.10(b)(2)(A) should deny full, two-level reductions to defendants whose sentences incorporate concurrent state time, while permitting reductions for defendants who did not serve time in state custody because the federal arrest came

first, or more illogically still, who were found by the federal judge to require consecutive sentences.

For example, a defendant sentenced in federal court before being sentenced in state court could receive fully concurrent sentences without any adjustment. That defendant would be eligible for a two-level retroactive sentence reduction. But a defendant sentenced first in state court must receive an adjustment for the sentences to run fully concurrently. That defendant would have limited eligibility for a sentence reduction, and the extent of any reduction would depend on the arbitrary factors that govern the extent of the adjustment: the duration of the state proceedings and whether and when the federal authorities filed a writ of habeas corpus ad prosequendum.

Mr. Mahan's case amply demonstrates the irrationality and arbitrariness of interpreting § 1B1.10(b)(2)(A) to prohibit concurrency adjustments. The low end of Mr. Mahan's pre-amendment guideline range called for a sentence of 140 months. The court granted a 20-month variance to 120 months to "account for" and give "some credit" for pretrial custody. The extent of the adjustment – 20 months – depended on factors unrelated to sentencing purposes; it could have been less if Mr. Mahan resolved the federal matter faster, and it would be non-existent if the federal sentence were imposed first. Yet the variance makes Mr. Mahan ineligible for a

sentence reduction, according to the district court's ruling. If the retroactive guideline policy statement creates arbitrary and irrational distinctions based on the mechanism for achieving concurrency, the provision is unconstitutional.

B. Arbitrary And Irrational Treatment Based On Timing And Sequence Of Prosecution Has No Legitimate Justification.

The concerns articulated by the Sentencing Commission in the administrative record – preventing windfalls and avoiding complexity – do not rationally justify limiting sentence reductions for defendants with concurrency adjustments while permitting full reductions for other defendants, including those who received consecutive sentences.[8] There are two specific problems.

First, the public hearing testimony established that defendants were not receiving windfalls under the prior version of § 1B1.10, because judges who had varied from the guideline range for policy reasons related to the amendment had discretion to deny any further sentence reduction, as did judges who still considered the sentence reasonable regardless of the lower guideline range. To the extent that the Commission believed that a departure or variance reflected a judge simply

[8] A law will be upheld against an equal protection challenge if any rational basis exists for the law, regardless of what reason, if any, the agency may have articulated for it. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Lazy Y*, 546 F.3d at 589-590. But the agency's rationale can inform the Court's analysis of whether a rational basis exists. *Lazy Y*, 546 F.3d at 590-91.

"ignoring" the guideline range, that view finds no support in the hearing testimony or in the legal requirements that courts use the guideline range as the starting point for imposing sentence. It also goes against the Supreme Court's finding that the guideline range strongly influences the sentence imposed. *Peugh v. United States*, 133 S. Ct. 2072, 2084 (2013) (citing empirical data indicating that "when a Guidelines range moves up or down, offenders' sentences move with it"). Even if such windfalls had been a problem, despite judicial discretion, eliminating all reductions for defendants who received either non-cooperation departures or variances for any reason, including to effect a concurrent sentence, is so attenuated from that precise concern that it does not provide a rational basis.

Second, the expanded limitation does not avoid undue complexity, litigation, or unwarranted disparity. The former version of § 1B1.10(b)(2) was straightforward: it gave courts discretion to adhere to the original sentencing court's ruling as closely as possible, while granting appropriate discretion to consider the purposes of the guideline amendment and other relevant factors. Although the former version distinguished between variances and departures to some degree, it promoted simplicity by leaving the decision as to both in the experienced hands of the district court judge. By preserving the decisions of the original sentencing court, which were based on both the guideline range and individualized consideration of the § 3553(a)

factors, the former versions of § 1B1.10(b)(2) promoted fairness and uniformity in sentencing.

By contrast, the new limitation increases the complexity of the rule by creating an unfounded distinction between substantial assistance departures and other types of departures and variances. It increased the likelihood of litigation by purporting to take away courts' discretion and usurping the judicial authority to adhere to concurrency decisions. *Setser*, 132 S. Ct. at 1469 ("Congress contemplated [in § 3584(a)] that only district courts would have the authority to make the concurrent-vs.-consecutive decision . . . ."). The limitation also increased the risk of undue sentencing disparity by overriding § 3553(a) decisions designed to meet the purposes of sentencing.

In sum, interpreting "amended guideline range" to exclude adjustments intended to effect a concurrent sentence would arbitrarily restrict some defendants' eligibility for a sentence reduction, without rationally advancing any legitimate government interest. The policy statement should be construed to include the 20-month adjustment granted "to achieve the functional equivalent of a concurrent sentence," or it is invalid for violating the Due Process and Equal Protection Clauses.

Conclusion

For the foregoing reasons, Mr. Mahan respectfully requests that the Court reverse the order denying in part the motion to reduce sentence and remand for the district court to determine, after full briefing by the parties, whether to exercise its discretion to reduce Mr. Mahan's sentence to 100 months.

Respectfully submitted this 4th day of March, 2016.

/s/ Stephen R. Sady
Stephen R. Sady

Elizabeth G. Daily
Attorneys for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**CA No. 15-30365**
	)	
v.	)	
	)	
WILLIAM JOHN MAHAN,	)	
	)	
Defendant-Appellant.	)	

STATEMENT OF RELATED CASES

I, Stephen R. Sady, undersigned counsel of record for defendant-appellant, William John Mahan, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6 that the following case(s) should be deemed related: *United States v. Padilla-Diaz*, No. 15-30279; *United States v. Heckman*, No. 15-30294; *United States v. Contreras-Guzman*, No. 15-30375; *United States v. Morales*, No. 15-30376; *United States v. Jose Hernandez-Martinez*, No. 15-30309; *United States v. Efigenio Aispuro-Aispuro*, No. 15-30310; *United States v. Alejandro Renteria-Santana*, No. 15-30315; *United States v. Jose Garcia-Zambrano*, No. 15-30351; *United States v. Edwin Magana-Solis*, No. 15-30352; *United States v. Diego Bermudez-Ortiz*, No.

15-30353; *United States v. Luis Pulido-Aguilar*, No. 15-30354; *United States v. Jose Carranza Gonzalez*, No. 15-30377; *United States v. Eduardo Bocanegra-Mosqueda*, No. 15-30383; *United States v. Aleksander Gorbatenko*, No. 15-30385; *United States v. Roberto Cervantes-Esteva*, No. 15-30391; *United States v. Obdulio Alvarado-Ponce*, No. 16-30000; *United States v. Omar Perez-Medina*, No. 16-30004; *United States v. Brito*, No. 15-30229; *United States v. Favela Gonzales*, No. 15-30347; *United States v. Snyder*, No. 16-30035; *United States v. Snyder*, No. 16-30036; *United States v. Snyder*, No. 16-30037; *United States v. Castaneda*, No. 16-30040; and *United States v. Aguilar-Sahagun*, No. 16-30041.

Dated this 4th day of March, 2016.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**CA No. 15-30365**
	)	
v.	)	
	)	
WILLIAM JOHN MAHAN,	)	
	)	
Defendant-Appellant.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,153 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2013, 14-point Times New Roman.

Dated this 4th day of March, 2016.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2016, I electronically filed the foregoing Opening Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jill C. Dozark
Jill C. Dozark

APPENDIX OF STATUTORY AND ADMINISTRATIVE PROVISIONS

INDEX

18 U.S.C. § 3584 (2006)

Multiple sentences of imprisonment

(a) Imposition of concurrent or consecutive terms. – If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms. – The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate. – Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

18 U.S.C. § 3585 (2006)

Calculation of a term of imprisonment

(a) Commencement of sentence. – A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) Credit for prior custody. – defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences –

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

U.S.S.G. § 5G1.3 (2015)

Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.

2. Application of Subsection (b).—

(A) In General.— Subsection (b) applies in cases in which all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (d).

(B) Inapplicability of Subsection (b).— Subsection (b) does not apply in cases in which the prior offense was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.— If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.— The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 90 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 25 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of 115 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

4. Application of Subsection (d).—

(A) In General.— Under subsection (d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));

(ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii) the time served on the undischarged sentence and the time likely to be served before release;

(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.— In some cases under subsection (d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.— Subsection (d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.— Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.— Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(d), rather than as a credit for time served.

5. Downward Departure Provision.— In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

Background: Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." See Setser v. United States, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. See Setser, 132 S. Ct. at 1468. Exercise of that discretion, however,

is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 289); November 1, 1991 (see Appendix C, amendment 385); November 1, 1992 (see Appendix C, amendment 465); November 1, 1993 (see Appendix C, amendment 494); November 1, 1995 (see Appendix C, amendment 535); November 1, 2002 (see Appendix C, amendment 645); November 1, 2003 (see Appendix C, amendment 660); November 1, 2010 (see Appendix C, amendment 747); November 1, 2013 (see Appendix C, amendment 776).; November 1, 2014 (see Appendix C, amendments 782, 787, and 789).

U.S.S.G. § 5K2.23 (2015)

Discharged Terms of Imprisonment (Policy Statement)

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

18 U.S.C. § 3582(c)(2) (2015)

Imposition of a sentence of imprisonment

(c) Modification of an imposed term of imprisonment. – The court may not modify a term of imprisonment once it has been imposed except that –

* * * * *

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

U.S.S.G. § 1B1.10 (2015)

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.--

(1) In General.--In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. 3582(c)(2). As required by 18 U.S.C. 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.--A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. 3582(c)(2) if--

(A) None of the amendments listed in subsection (d) is applicable to the defendant; or

(B) An amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.--Consistent with subsection (b), proceedings under 18 U.S.C. 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.--

(1) In General.--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 (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant

was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitation and Prohibition on Extent of Reduction.--

(A) Limitation.--Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception for Substantial Assistance.--If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) Prohibition.--In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.--If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) Covered Amendments.--Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction.--

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. *Application of Subsection (a).—*

(A) Eligibility.— Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy

statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b). For purposes of this policy statement, however the amended guideline range is considered to

be 87 to 108 months (i.e., unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. Application to Amendment 750 (Parts A and C Only).—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to §2D1.1 (see §2D1.1, comment. (n.8)). Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

6. Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. Supervised Release.—

(A) Exclusion Relating to Revocation.— Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

8. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are

applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If 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." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

*The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines * or when there is only a minor downward adjustment in*

the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

*So in original. Probably should be "to fall above the amended guidelines".

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 306). Amended effective November 1, 1990 (see Appendix C, amendment 360); November 1, 1991 (see Appendix C, amendment 423); November 1, 1992 (see Appendix C, amendment 469); November 1, 1993 (see Appendix C, amendment 502); November 1, 1994 (see Appendix C, amendment 504); November 1, 1995 (see Appendix C, amendment 536); November 1, 1997 (see Appendix C, amendment 548); November 1, 2000 (see Appendix C, amendment 607); November 5, 2003 (see Appendix C, amendment 662); November 1, 2007 (see Appendix C, amendment 710); March 3, 2008 (see Appendix C, amendments 712 and 713); May 1, 2008 (see Appendix C, amendment 716); November 1, 2011 (see Appendix C, amendment 759); November 1, 2012 (see Appendix C, amendment 770); November 1, 2014 (see Appendix C, amendments 780, 788, and 789).