Nos. 15-30279, 15-30294, 15-30375, 15-30376

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARMANDO PADILLA-DIAZ, JEFFREY HECKMAN JR., BERNARDO CONTRERAS GUZMAN, and JOSE MORALES,

Defendants-Appellants.

Consolidated Appeal from the United States District Court for the District of Oregon
Case Nos. 3:08-cr-00126-MO, 3:10-cr-00143-MO, 3:12-cr-00291-SI

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

These four consolidated cases are appeals from the denial of retroactive sentence reductions that the defendants sought in the District of Oregon under U.S.S.G. Amendment 782 and 18 U.S.C. §3582(c)(2). The district court had jurisdiction under 18 U.S.C. §3231 to decide the extent of its authority to reduce the defendants' sentences. The district court denied the sentence reductions for two of the defendants, Armando Padilla-Diaz and Jeffrey Heckman, in separate Orders and Opinions dated September 16, 2015 and September 18, 2015. ER-APD 1-5, ER-JH 1-5.[1] Mr. Padilla-Diaz filed a Notice of Appeal on September 23, 2015. ER-APD 6. Mr. Heckman filed a Notice of Appeal on September 30, 2015. ER-JH 6.

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[1] The designation "ER" refers to the Excerpts of Record. The "ER" reference shall be followed by designations "APD," "JH," and BGJM," which are the initials of the defendants whose Excerpts are being referenced. "APD" is Armando Padilla-Diaz. "JH" is Jeffrey Heckman. "BGJM" is Bernardo Guzman and Jesus Morales, who filed joint pleadings in their applications for sentence reductions. The citation shall then recite the page number or numbers. The designation "ER-APD 1-5," then, refers to the Excerpts of Record for Armando Padilla-Diaz at pages 1-5.

The parties are also filing separate Sentencing Excerpts of Record under seal containing confidential sentencing materials, such as the Presentence Reports, pursuant to Circuit Rule 30-1.10. Those citations adopt the same format as just noted, except that the designation "SER" shall appear instead of "ER." Thus the citation "SER-JH-1" would refer to the Sentencing Excerpts of Record for Jeffrey Heckman at page 1.

A different district judge denied the sentence reductions for co-defendants Bernardo Guzman and Jesus Morales in an Opinion and Order dated December 2, 2015, and in an Order dated December 8, 2015. ER-BGJM 1-36. Both defendants filed Notices of Appeal on December 14, 2015. ER-BGJM 37, 38. This Court's jurisdiction rests on 18 U.S.C. §3742(a) and 28 U.S.C. §§1291 and 1294(1). All of the Notices of Appeal were timely under FRAP Rule 4(b)(1).

STATEMENT OF ISSUES

Before 2011, all retroactive guideline amendments gave courts discretion to include original departures and variances in retroactive sentence reductions. After 2011, the Sentencing Commission for the first time created classes of eligible defendants, purporting to exclude defendants who had received departures and variances for reasons other than substantial assistance. This appeal raises three issues of first impression:

1. Is the limitation in U.S.S.G. §1B1.10 (2011), prohibiting retroactive reductions because the defendants previously received variances or departures, in irreconcilable conflict with the statutory directive in 28 U.S.C. §991(b)(1)(B) that all sentencing policies and practices must avoid unwarranted sentencing disparity while permitting sufficient flexibility to make individualized sentencing decisions?

2. Does the application of the current version of U.S.S.G. §1B1.10(b)(2)(A) to nullify the previously-awarded departures and variances violate the Equal Protection Clause by prohibiting a reduction for people who have been deemed to be deserving of lower, below-guideline sentences, but permitting a reduction for people who have been deemed to require longer, within-guideline sentences?

3. As to defendants Padilla-Diaz and Heckman, who pled guilty under the pre-2011 version of U.S.S.G. §1B1.10(b)(2)(A), does the due process-based retroactivity doctrine require the new version of §1B1.10(b)(2) to apply only prospectively?

STATEMENT OF THE CASE

Nature of the Case

These are appeals from the denial of retroactive sentencing reductions under U.S.S.G. Amendment 782 and 18 U.S.C. §3582(c)(2). The reductions for defendants Padilla-Diaz and Heckman were denied by the Honorable Michael W. Mosman, United States District Judge for the District of Oregon. The reductions for defendants Guzman and Morales were denied by the Honorable Michael H. Simon, United States District Judge for the District of Oregon.

Relevant Facts And Procedural History

1. Armando Padilla-Diaz

Mr. Padilla-Diaz pled guilty on January 7, 2010, to one count of conspiracy to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine. The complex case had been ongoing for almost two years, and involved 11 co-defendants, wiretaps of numerous telephones over a substantial time, search warrants for various individuals and locations, and interactions with several confidential informants. ER-APD 81-87. Negotiation of the defendant's plea was prolonged, involving submission of mitigating materials by defense counsel, extensive negotiations, and a settlement conference with a federal magistrate judge. ER-APD 102-103.

The resulting plea agreement was detailed and specific. The parties agreed to recommend to the district court a base offense level under the then-existing Drug Quantity Table and a three level downward adjustment for acceptance of responsibility. ER-APD 75. The plea agreement allowed the government to seek a two-level upward role adjustment and to oppose a downward safety valve adjustment. ER-APD 76.

For the defendant, the central benefit of the plea agreement was contained in two separate and mutually recommended reductions under §3553(a), totaling a three-level downward variance:

> **9. 3553(a) Adjustment:** The USAO agrees to recommend two variances pursuant to 18 U.S.C. §3553(a).
>
> **A. Forfeiture of Right to Challenge Wiretaps, Statements and Seizure of Physical Evidence:** In return for the defendant agreeing not to file any pretrial motions challenging the wiretaps, his statements and the seizure of physical evidence in this case the government agrees to recommend that the Court grant the defendant an additional two-level reduction in his offense level. The government recognizes that the defendant's agreement to forgo filing pretrial motions is an added benefit beyond the standard acceptance of responsibility. Absent qualification for "safety valve" relief, such a recommendation shall not result in a sentence below any otherwise applicable mandatory minimum sentence.
>
> **B. Forfeiture of Right to Seek a Lesser Sentence:** In return for the defendant agreeing not to seek a lesser sentence, the government agrees to recommend that the Court grant the defendant an additional **one-level reduction** in his offense level. Absent qualification for "safety valve" relief, such a recommendation shall not result in a sentence below any otherwise applicable mandatory minimum sentence.

ER-APD 75-76 (boldface in original). Mr. Padilla-Diaz explicitly agreed not to seek a lower sentence as consideration for the second of the recommended variances and separately agreed not to seek any further variances on other grounds. ER-APD 75-76, 78. The plea agreement also expressly contemplated that Mr. Padilla-Diaz would be able to seek a sentence reduction in the event of future retroactive amendments to the guidelines. ER-APD 78 (excluding from waiver of appeal and 28 U.S.C. § 2255 motions the right to file a motion "as provided in . . . 18 U.S.C. § 3582(c)(2)").

The court sentenced Mr. Padilla-Diaz on April 9, 2010, in full accord with the recommendations in the plea agreement. ER-APD 47-52. The court applied the base offense level of 38, adjusted it upward by two levels for the leadership role, downward by three levels for acceptance of responsibility, and then downward an additional three levels for the agreed-upon §3553(a) variance, creating a total offense level of 34. With a Criminal History Category I, Mr. Padilla-Diaz's guideline range was 151 to 188 months. ER-APD 56-57. The court sentenced him to the low end of that range, again in accord with the mutual recommendation in the plea agreement. ER-APD 76. Neither party appealed.

It is undisputed that Amendment 782 reduced Mr. Padilla-Diaz's base offense level under the Drug Quantity Table from 38 to 36. If he were to receive the benefit of the terms of his plea agreement, including the downward variance, his total

offense level would become 32 instead of 34, with a guideline range of 121 to 151 months. ER-APD 9-10.

2. Jeffrey Heckman

Mr. Heckman pled guilty on February 25, 2011, to one count of distributing methamphetamine in violation of 21 U.S.C. § 841(a)(1). ER-JH 79-84. The charges were based on Mr. Heckman's sale of pills he believed to contain ecstasy (MDMA), but which laboratory analysis revealed contained mostly benzylpiperazine (BZP), combined with caffeine, other chemicals, and a low percentage of methamphetamine. SER-JH 7-8. Mr. Heckman reserved in his plea agreement the right to seek a downward departure or variance. ER-JH 102. The plea agreement expressly contemplated that Mr. Heckman would be able to seek a sentence reduction in the event of future retroactive amendments to the guidelines. ER-JH 103 (excluding from waiver of appeal and U.S.C. §2255 motions the right to file a motion "as provided in . . . 18 U.S.C. § 3582(c)(2)").

The parties agreed that Mr. Heckman's total offense level was 29 and his Criminal History Category was II, creating a sentencing guideline range of 97-121 months. SER-JH 9, 13, ER-JH 86. At sentencing Mr. Heckman sought, and the government agreed that he should receive, a four-level downward departure to a

range of 63-78 months, and a low end sentence of 63 months, based on the circumstances of the case. The Government's Sentencing Memorandum stated:

> As pointed out by the defense letter, defendant's sales were made to the government informant on the representation that the substance was ecstasy (MDMA) when in fact it was not. Instead, defendant sold a street drug combination of the controlled substance BZP (Benzylpiperazine), and Methamphetamine and several other non-controlled substances. The substitution of BZP for MDMA is not unheard of on the illegal street drug market, with both sold as ecstasy. The amount of BZP was significantly more than that of methamphetamine, and the methamphetamine was a very low percentage of the overall drug combination.
>
> **Government's Sentence Recommendation**
>
> The Government finds the Defendant's letter advocating a sentence of 63 months persuasive. The Government joins with the defense and respectfully requests that the Court impose a sentence of 63 months, 3 years of post-prison supervision, a $100 fee assessment and dismissal of all remaining counts.

ER-JH 86-87.

The court sentenced Mr. Heckman on June 30, 2011, to 63 months, as the parties jointly recommended. ER-JH 80.

As with Mr. Padilla-Diaz, it is undisputed that Amendment 782 has reduced Mr. Heckman's base offense level from 32 to 30. The parties and the district court agreed that, if he prevails in this appeal and receives a sentence that includes both the downward departure and the reduced offense level, he would be eligible for a sentence of 51 months. ER-JH 9-10.

3. Bernardo Guzman and Jesus Morales

The underlying facts relating to these two defendants will be described together because they were co-defendants, and their sentences are interrelated. Mr. Guzman and Mr. Morales were indicted together, with seven others, to multiple counts alleging drug activity. ER-BGJM 170-175. On May 21, 2013, and May 28, 2013, respectively, they pled guilty to count one of the superseding indictment, alleging conspiracy to distribute heroin and methamphetamine and to use communication devices, in violation of 21 U.S.C. §§841(a), 841(b)(1)(A), 843 and 846. ER-BGJM 153-163, 164-169.

The plea agreements were similar in both cases. In both cases the parties agreed to a base offense level of 36 under the then-existing Drug Quantity Table. ER-BGJM 154, 165. In both cases the parties agreed to recommend a three-level downward adjustment under U.S.S.G. §3E1.1 for acceptance of responsibility. ER-BGJM 154, 165. The parties agreed to a two-level downward adjustment under the safety valve, U.S.S.G. §§2D1.1(b)(16) and 5C1.2. ER-BGJM 154, 165.

The plea agreements for both defendants contained the following identical provision calling for downward variances:

> **8. Resolution of a Complex Case**: The parties agree to recommend a two-level downward adjustment pursuant to 18 U.S.C. §3553(a) for resolution of a case designated by the court as complex because no pretrial motions were filed or litigated.

ER-BGJM 154, 165. Implicit in the plea agreement for Mr. Morales, and later made explicit in the Government's Sentencing Memorandum, was an additional two-level downward variance because he was less culpable than Mr. Guzman and another codefendant, Domingo Lopez-Hernandez. ER-BGJM 131, 135, 136-137. Accordingly, the plea agreement for Mr. Guzman anticipated a government recommendation of 87 months imprisonment (level 36 minus 2 for safety valve, minus 3 for acceptance of responsibility, minus 2 for the variance, equating to a level 29 and a range of 87-108 months). ER-BGJM 164-165. The plea agreement for Mr. Morales anticipated a government recommendation of 70 months (level 36 minus 2 for safety valve, minus 3 for acceptance of responsibility, minus 4 for the variances, equating to a level 27 and a range of 70-87 months). ER-BGJM 153-154.

The court sentenced Mr. Guzman on August 14, 2013, to 87 months, awarding the agreed two-level variance. ER-BGJM 139. The court sentenced Mr. Morales to 70 months on October 9, 2013, again giving full credit for the agreed variances. ER-BGJM 124. Neither defendant appealed.

Again, it is undisputed that Amendment 782 has reduced the defendants' base offense levels under the Drug Quantity Table from 36 to 34. If Mr. Guzman were to receive the benefit of the terms of his plea agreement, including the downward variance, his total offense level would become 27 instead of 29, with a guideline

range of 70 to 87 months. Mr. Morales's new range would be 57 to 71 months, based on a total offense level 25.

4. Sentence Reduction Motions

All four defendants filed motions for sentence reductions under U.S.S.G. Amendment 782, which became effective November 1, 2014. The primary point of contention between the defendants and the government was whether the revision of U.S.S.G. §1B1.10 enacted in 2011 prohibited the district court from granting sentence reduction motions incorporating previously granted downward departures and variances. After hearing oral argument, Judge Mosman issued an Order denying sentence reductions for Mr. Padilla-Diaz and Mr. Heckman on September 16, 2015, followed by a written Opinion and Order regarding the denial on September 18, 2015. ER-APD 1-5, ER-JH 1-5. After hearing oral argument, Judge Simon issued an Opinion and Order denying the sentence reductions for Mr. Guzman and Mr. Morales on December 2, 2015, followed by a formal Order on December 8, 2015. ER-BGJM 1-36.

On February 9, 2016, this Court entered an Order in each of these four appeals, consolidating them for briefing and calendaring. The same Order held numerous related appeals in abeyance pending the outcome of these four cases.

Standard of Review

The Court of Appeals reviews for abuse of discretion the district court's denial of a motion for reduction of sentence under 18 U.S.C. §3582(c). *United States v. Tercero*, 734 F.3d 979, 981 (9th Cir. 2013); *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010). However, in the present cases, the district courts based their denial of the sentence reductions on legal analysis only, and not on factual findings or the exercise of discretion. This Court 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)); *Tercero*, 734 F.3d at 981; *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009).

Custody/Bail Status/Release Date

All four of the defendants in this consolidated brief are in the custody of the United States Bureau of Prisons, serving the sentences imposed on them with projected release dates as follows: Mr. Padilla-Diaz, March 28, 2019; Mr. Heckman, April 7, 2016; Mr. Guzman, October 6, 2018; Mr. Morales, July 11, 2017.

SUMMARY OF ARGUMENT

In all four of these case, Amendment 782 retroactively reduced the defendants' base offense level and resulting guideline range by two levels. The district court in all four cases denied the reduction based on U.S.S.G. §1B1.10(b)(2), a policy statement that, since November 2011, prohibits retroactive reductions below the low end of the amended guideline range in non-cooperation cases. Each of the defendants here previously received downward variances or non-cooperation departures of at least two levels, with the result that their original sentences were already equal to or lower than the low end of their new post-Amendment 782 guideline range.

The district courts erred for three reasons. First, the limitation in §1B1.10(b)(2)(A) prohibiting a reduction for defendants who previously received variances or departures is in irreconcilable conflict with the statutory directive in 28 U.S.C. §991(b)(1)(B) to avoid unwarranted sentencing disparity among similarly situated defendants and maintain sufficient flexibility to permit individualized sentences. Departure and variance decisions made during the original sentencing remain necessary, even after the guideline range has been amended, to ensure fairness, avoid unwarranted disparity, and account for individualized circumstances, unless the amendment fully encompasses the reason for and extent of the departure

or variance. By effectively nullifying previously-awarded §3553(a) variances, it also violates the rule that sentence modifications for retroactive amendments cannot revisit §3553(a) determinations made during the original sentencing.

Second, application of the current version of U.S.S.G. §1B1.10(b)(2)(A) to undo the previously-awarded departures and variances would violate the Equal Protection Clause. A downward departure or variance represents a judicial determination that a sentence below the guideline range best serves the purposes of sentencing. Prohibiting a reduction for people who have been deemed to be deserving of lower, below-guideline sentences, but permitting a reduction for people who have been deemed to require longer, within-guideline sentences, creates an irrational and arbitrary classification without sufficient justification.

Third, as to defendants Padilla-Diaz and Heckman, who pled guilty under the prior version of §1B1.10(b)(2) that allowed sentence reduction proceedings to incorporate previously-awarded departures and variances, the new version of U.S.S.G. §1B1.10(b)(2)(A) must be applied prospectively only under the due process-based doctrine that limits retrospective application of new laws that would disrupt settled expectations regarding past transactions.

ARGUMENT

I. BY NEGATING WARRANTED DEPARTURES AND VARIANCES FROM THE GUIDELINE RANGE, THE POLICY STATEMENT CONFLICTS WITH THE SENTENCING COMMISSION'S STATUTORY DIRECTION IN 28 U.S.C. §991(B) TO PROMOTE THE PURPOSES OF SENTENCING AND AVOID UNWARRANTED SENTENCING DISPARITY.

A. Congress Has Mandated That Sentencing Policies And Practices Must Promote The Purposes Of Sentencing And Avoid Unwarranted Disparity.

The Sentencing Commission is required by statute to "establish sentencing policies and practices for the Federal criminal justice system" that, among other things, (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 defendants with similar records who commit similar offenses "while maintaining sufficient flexibility to permit individualized sentencing decisions." 28 U.S.C. §991(b). The purposes of sentencing set out in §3553(a)(2) include the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

This overarching mandate in §991(b) to meet these goals "for the Federal criminal justice system" necessarily includes retroactive sentencing reduction proceedings under 28 U.S.C. §3582(c)(2), which are part of the Federal criminal justice system. Sentencing Guidelines that are inconsistent with the Sentencing Commission's originating statute 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"). In *LaBonte*, the Supreme Court struck down the Sentencing Commission's provision for determining the offense level for career offenders as inconsistent with the statutory directive of 28 U.S.C. §994(h) to provide for sentences "at or near" the "maximum term authorized." *Id*. at 753. The Court was "unmoved" by the Commission's stated justifications for departing from the statutory directive.

B. The Post-2011 Policy Statement At U.S.S.G. §1B1.10(b)(2)(A) Conflicts With The Statutory Directives In 28 U.S.C. §991(b) Because It Nullifies Guideline Decisions Necessary To Prevent Unwarranted Disparity.

Section 3582(c)(2) allows district judges to reduce sentences when sentencing guideline ranges have been retroactively lowered. Judges may lower sentences in that situation "after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. §3582(c)(2).

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. *Tercero*, 734 F.3d at 983. In *Dillon v. United States*, the Court denied a defendant's request that, in applying the 2008 crack guideline reduction, the court also consider variances that were previously unavailable because he had been sentenced before *United States v. Booker*, 543 U.S. 220 (2005). 560 U.S. 817 (2010). The Court held that the district court could not reconsider aspects of the sentence other than the guideline reduction because "§3582(c) does not authorize a sentencing or resentencing proceeding." *Dillon*, 560 U.S. at 825. *Dillon* found no Sixth Amendment implications in a sentence reduction process under §3582(c) and §1B1.10(b)(2) because of the "circumscribed nature" of sentence modification proceedings, and the "fundamental differences" between a sentencing proceeding versus a sentence reduction proceeding applying a retroactive guideline. 560 U.S. at 830. The Court in *Dillon* noted 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." 560 U.S. at 831. Because *Dillon* involved a situation where the defendant could not have received variances in his original sentencing, the opinion did not expressly address the authority of the court when the defendant *did* receive departures or variances originally. However, the Court's reasoning suggests that

such decisions should not be revisited to a degree greater than necessary to implement the guideline amendment.

The applicable policy statement issued by the Sentencing Commission relating to retroactive guideline amendments is U.S.S.G. §1B1.10. Although §1B1.10 has been amended from time to time, every version until November 2011 allowed district judges to honor previously awarded downward departures or variances in conducting retroactive sentence reduction proceedings.[2] The current version, effective since November 2011, does not. The process under the new version is that the sentencing reduction judge must first determine what the new amended range is. §1B1.10(b)(1). The policy statement then prohibits any reduction below the bottom of that range for defendants who originally received downward variances or departures for reasons other than substantial assistance:

> 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.

U.S.S.G. §1B1.10(b)(2)(2011).

This post-2011 policy statement conflicts with the overarching congressional mandate to the Sentencing Commission in 28 U.S.C. §991(b)(1) to assure the

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[2] The history of amendments to §1B1.10 is set out at length at pages 42-44, below.

meeting of the purposes set out in 18 U.S.C. §3553(a)(2), and to "avoid unwarranted sentencing disparities" among defendants with similar records who commit similar offenses "while maintaining sufficient flexibility to permit individualized sentencing decisions."

This is because §1B1.10 now nullifies departures and variances from the guideline range that were necessary to meet the statutory mandates of achieving a sentence sufficient but not greater than necessary under §3553(a). The advisory guideline range plays a significant part of that well-established sentencing process. A court imposing a sentence 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. *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). The purposes of sentencing include the need to avoid unwarranted sentencing disparities. 18 U.S.C. §3553(a)(6). In the sentencing equation, the guideline range serves as the "starting point and the initial benchmark" for determining the "sufficient, but not greater than necessary" sentence. *Gall v. United States*, 552 U.S. 38, 50 (2007).

The guideline range and the Sentencing Commission's policy statements are among the §3553(a) factors that the court must consider. 18 U.S.C. §3553(a)(4),

(5). 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). Thus, the defendant's sentence must be reasonable in relation to the guideline range.

The §1B1.10(b)(2)(A) limitation on implementing departure and variances from the guideline range violates the Sentencing Commission's statutory directive in §991(b), because it requires courts to ignore the fact that departures and variances from the guideline range, as retroactively amended, remain necessary to ensure fairness, to avoid unwarranted disparity, and to account for individualized circumstances. The current policy statement does not "leave all other guideline applications unaffected." *Dillon*, 560 U.S. at 831. Rather, it *undoes* previous guideline applications and previous §3553(a) determinations made by the original sentencing court. By doing so, it injects disparity and unfairness into the sentence resulting from the §3582(c) motion in violation of §991(b) and §3553(a).

All four of these defendants serve as examples of §1B1.10(b)(2) nullifying previous sentencing determinations that a sentence should be below the guideline range. For instance, Mr. Guzman negotiated for a recommendation of a two-level downward variance. The court considered all the §3553(a) factors, determined that the variance was appropriate, and granted it. Amendment 782 lowers his guideline

range so that his sentence of 87 months is now exactly the low end of the guideline range instead of two levels below it. Thus, §1B1.10(b)(2) has taken the variance away from Mr. Guzman so that his sentence is exactly where it would be had he not negotiated for a variance in the first place.

C. This Court In *Tercero* Did Not Decide The Statutory Arguments In This Case.

Judge Mosman, in the *Padilla-Diaz* and *He*ckman cases, did not issue a written opinion on the statutory conflict issue. Judge Simon, in the *Guzman/Morales* case, did. He did not address the merits of the issue, however, instead holding that the issue was foreclosed by *Tercero*. ER-BGJM 21-24.

Judge Simon was in error because the statutory conflict issue was never raised or discussed in *Tercero*. Neither the decision nor the briefs of the parties ever mentioned 28 U.S.C. §991(b), nor did they engage in any analysis of the standards set out in that statute. Appellant's Opening Brief, *Tercero*, 734 F.3d 979 (Nov. 19, 2012) (No. 12-10404), 2012 WL 5947136; Brief for the United States As Appellee (Dec. 14, 2012), 2012 WL 6682049.

Tercero cannot be held to stand as precedent for an issue that was neither stated in the opinion nor raised by the parties. *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to

constitute precedents."); *United States v. Joyce*, 357 F.3d 921, 925 n. 3 (9th Cir. 2004) (same). Similarly, "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001); *see Hagans v. Lavine*, 415 U.S. 528, 535, n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.").

Tercero involved a defendant who had received a two-level downward departure at her original sentencing, and as a result received a minimal reduction following U.S.S.G. Amendment 750, which retroactively amended the crack cocaine offense levels. *Tercero*, 734 F.3d at 980-981.

On appeal, the defendant argued generally that the restriction on sentencing reductions in §1B1.10(b)(2) conflicted with various laws and policy statements, but the defendant did not identify any particular laws with which §1B1.10(b)(2) purportedly conflicted. The briefs in particular made no mention of §991(b). This Court affirmed the district court's denial of a reduction below the amended guideline range in an opinion that wrestled with the imprecision of the defendant's arguments. The Court first noted that the defendant claimed that "§1B1.10 contradicts Congress's general intent in passing the [Fair Sentencing Act]" but did not identify

any specific provisions of the FSA with which §1B1.10 conflicted." *Tercero*, 754 F.3d at 982. Similarly the defendant argued that the new version of §1B1.10(b)(2) conflicts with the "purpose of the guidelines" to bring about an "effective, fair sentencing system" with "honest, uniform and proportionate sentences." *Tercero*, 754 F.3d at 983. The defendant's brief cited the general policy statements at U.S.S.G. Chapter 1, Part A as stating the "purpose of the guidelines," but made no statutory argument under §991(b). This Court rejected that argument without specifying any source for the stated "purpose of the guidelines." *Id*. Neither the Court in its opinion nor the parties in the briefs ever mentioned 28 U.S.C. §991(b). The phrases "avoiding unwarranted sentencing disparities" or "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors," which are key requirements of §991(b), never appear in the opinion, nor do any other related or similar phrases or concepts, indicating that the Court never considered them.

This Court should address the statutory argument in the first instance. "[W]e rely 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, 244 (2008) (footnotes omitted). Here, a discussion about whether §1B1.10 conflicts with some generalized "purpose of the guidelines" cannot substitute for, or

preclude, an analysis of the particular statutory language appearing in §991(b), using rules of interpretation, assessments of congressional intent, and other means of analysis of the issue that were absent from *Tercero* because of the defendant's unfocused and non-specific arguments.

II. APPLYING U.S.S.G. §1B1.10(B)(2)(A) TO DENY SENTENCE REDUCTIONS TO THE CLASS OF DEFENDANTS WHO HAVE PREVIOUSLY RECEIVED VARIANCES OR NON-COOPERATION DEPARTURES WOULD VIOLATE THE EQUAL PROTECTION CLAUSE BY IRRATIONALLY DENYING REDUCTIONS TO OFFENDERS MOST DESERVING OF LOWER SENTENCES WHILE GRANTING REDUCTIONS TO OFFENDERS WHO WERE DETERMINED TO REQUIRE LONGER SENTENCES.

By limiting the extent of a retroactive sentence reduction to the low end of a defendant's amended guideline range before departures and variances, the current version of §1B1.10(b)(2)(A) draws an irrational and arbitrary distinction between two classes of defendants who have previously received a sentence "sufficient, but not greater than necessary" under 18 U.S.C. §3553(a). The first class consists of those defendants who received a downward variance or non-cooperation departure at the time of their original sentencing. The limitation renders those defendants ineligible for a full, two-level reduction, effectively eliminating or reducing the extent of the original sentence's departure or variance from the guideline range. The second class consists of those defendants who did not receive a downward variance or non-cooperation departure at the time of their original sentencing. Those

defendants are eligible to receive a full, two-level reduction, and even a potential further reduction to the low end of the new range if they did not receive a low end sentence originally.

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 distinguish 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)). For example, and particularly relevant here, courts have recognized that equal protection considerations prohibit granting credit for presentence custody to more serious offenders while denying them to less serious ones. *Jonah R. v. Carmona*, 446 F.3d 1000, 1008 (9th Cir. 2006) (irrational to provide presentence credits to adults but not juveniles); *Myers v. United States*, 446 F.2d 232, 234 (9th Cir. 1971); *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.").

Here, the denial of a full, two-level reduction to people who previously received non-cooperation departures or variances is wholly irrational because it denies the reduction to defendants who have previously been determined to be the *most* deserving of comparably lower sentences, while allowing the full reduction for *less* deserving defendants. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015) (treating less serious offenses more harshly than more serious offenses "makes scant sense"). That is to say, the people who are now being denied full sentence reductions are the people about whom the sentencing court previously found that a below-guideline sentence was "sufficient, but not greater than necessary," to carry out the purposes of federal sentencing under §3553(a). By contrast, the people who are eligible to receive a more extensive retroactive reduction are those whom the court determined required a longer, within-guideline sentence under the §3553(a) factors.

The irrationality is easily illustrated by example. Imagine two defendants who were convicted of the same crime, had similar criminal histories, and identical guideline ranges. For one defendant, the original sentencing court found that, because of that person's history and characteristics, a sentence below the guideline range was sufficient but not greater than necessary to provide just punishment, afford future deterrence, and protect the public. The court granted a two-level downward variance for that defendant. For the other defendant, the court found no similar

reason for a lower sentence, determined that a longer sentence was necessary to carry out the purposes of §3553(a), and granted no variance at all. The effect of §1B1.10(b)(2)(A) is that the latter defendant – the one without mitigating personal characteristics establishing that a lower sentence will meet the purposes of sentencing – is eligible to receive a full, two-level retroactive sentence reduction, while the former defendant is not. The two defendants are now likely to serve the same sentence, despite the fact that one of them was found to be less deserving of a lower sentence than the other.

In his Opinion and Order in the *Guzman* and *Morales* cases, Judge Simon, while denying the reduction, used his own hypothetical to recognize that §1B1.10(b)(2) upsets previous sentencing determinations and rewards defendants who were originally found less deserving of below-guideline sentences:

> This hypothetical assumes everything relating to Guzman and Morales's sentencing remains the same, expect that Guzman and Morales do not receive the two-level downward variance for resolving a complex case without litigation. Under this scenario, Guzman has an offense level of 31 and receives a guideline sentence of 108 months. Morales, still benefiting from the two-level downward variance for being less culpable, has an offense level of 29 and is sentenced to 87 months. Guzman, not having received any variances or non-cooperation departures, is then eligible for a two-level reduction under Amendment 782, which would reduce his offense level to 29 and his sentence to 87 months, the same as Morales's original sentence. Morales remains ineligible for any reduction under Amendment 782, and thus could end up with the same sentence as Guzman despite the fact that Morales's plea agreement, the prosecutor, and the original

> sentencing judge all contemplated that Morales was less culpable and deserved a shorter sentence than Guzman.

ER-BGJM 30.

Despite recognizing that the current version of §1B1.10(b)(2) has this effect of upsetting previous sentencing determinations, Judge Simon denied the equal protection claim in the *Guzman* and *Morales* cases based on essentially two points. First, Judge Simon attempted to distinguish the *Dunn*, *Myers*, and *Jonah R.* cases. Second, Judge Simon found that the defendants had not disproven any rational basis for the Sentencing Commission's actions.

Taking these in turn, the district court's attempts to distinguish *Dunn*, *Myers*, and *Jonah R.* fail because the distinctions drawn by Judge Simon are either unimportant or incorrect. The *Dunn* case held that there was no rational basis to award presentence credits to defendants sentenced to crimes carrying mandatory minimums but not to defendants convicted of lesser crimes that did not carry such sentences. *Dunn*, 376 F.2d at 193-194. Similarly, the defendants here claim it is irrational to prohibit sentence reductions for a class of defendants previously determined to be more deserving of lower sentences in relation to the guideline range, while allowing them for a class of defendants previously determined be deserving of higher sentences within their range.

Judge Simon's Opinion claimed that no such class distinction had been established:

> Defendants have not shown that offenders who did not receive downward departures or variances are necessarily more dangerous or less deserving than offenders who did receive such departures or variances. The Court declines to so broadly paint the entire class. Departures or variances are given for many reasons and are not necessarily an indication that an offender is less dangerous than an offender who did not receive a departure or variance.

ER-BGJM 26. This passage both misstates the defendants' arguments and is simply wrong. The defendants do not claim that offenders who do not receive downward variances are necessarily more dangerous than offenders who do. Dangerousness to the public is one factor the sentencing court must consider under §3553(a)(2)(C) ("to protect the public from further crimes of the defendant"). Section 3553(a) requires the court to take other factors into account as well, and the sentencing determination must weigh them all.

But the court's assertion that offenders who do not receive downward departures or variances are not "less deserving" of them than offenders who do is difficult to understand. Sentencing law requires courts to consider the guideline range as "the starting point and the initial benchmark" for imposing sentence. *Gall*, 522 U.S. at 49. Downward departures and variances represent the sentencing court's considered judgment that the purposes of sentencing – including rehabilitation,

deterrence, protection of the public, and avoiding disparity – are best served by a sentence below the guideline range. Conversely, the refusal to grant downward departures or variances represents the sentencing court's determination that a higher, within-guideline sentence better meets those purposes. Comparing those two classes of defendants, the first group has been determined to be more deserving of lower sentences in relation to the guideline range than the second group. The defendants' claim here remains that it is irrational for the Sentencing Commission to have promulgated §1B1.10(b)(2) because it categorically allowed eligibility for sentence reductions for offenders previously determined to be less deserving of lower sentences while categorically denying eligibility for reductions to offenders previously determined to be more deserving.

The district court also distinguished *Dunn*, *Myers*, and *Jonah R.* from the present case on the basis that the granting of presentence credit in those cases was automatic, whereas under §1B1.10, the district court still retains discretion to deny a sentence reduction, even if a person is eligible for it, apparently reasoning that the sentence reduction court can avoid disparity by denying a reduction to eligible defendants who are more culpable. ER-BGJM 26. This distinction is irrelevant. The issue here is not whether an offender ultimately *receives* a reduction. The issue is whether an offender is *eligible* for one. The disparate treatment occurs before the

judge exercises discretion. Defendants who previously received non-cooperation, below-guideline sentences are automatically and categorically precluded from receiving the benefit of retroactive guideline reductions. Defendants who did not receive such previous sentencing consideration are eligible. This is an irrational classification based on eligibility.

The district court's second stated basis for ruling against the defendants' equal protection claim is that, according to the district court, the defendants failed to negate every possible rational basis for the distinction drawn by §1B1.10(b)(2). ER-BGJM 31. *See Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (challenging party must disprove rational basis). A classification is rationally related to a legitimate government interest if there is any reasonably conceivable set of facts that could provide a rational basis for the classification. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Rational basis review, while deferential, nonetheless requires that the action taken by the agency must actually further the stated purpose:

> The Supreme Court has cautioned that "even the standard of rationality ... must find some footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321, 113 S. Ct. 2637; *accord* [*Immigrant Assistance Project v. INS*, 306 F.3d 842, 872 (9th Cir. 2002)] (quoting *Heller*). Consistent with this admonition, our circuit has allowed plaintiffs to rebut the facts underlying defendants' asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose.

Lazy Y Ranch, 546 F.3d at 590-591. In other words, it is not sufficient under rational basis review that the Sentencing Commission have legitimately stated a basis for the action it took. The courts must additionally inquire into whether the action actually furthers the stated purpose. A court can accept a rational basis even when there is an imperfect fit between the means and ends (*Heller*, 509 U.S. at 321), although the court "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446; *Lazy Y Ranch*, 546 F.3d at 589.

The Sentencing Commission articulated two categories of reasons for its enactment of the new version of §1B1.10(b)(2) in 2011.[3] First, the Sentencing Commission asserted that the previous version had proven difficult to apply and had prompted litigation because it distinguished to some extent between departures and variances. The Sentencing Commission thus asserted that a blanket prohibition on consideration of both variances and departures, except for departures based on cooperation, "furthers the need to avoid unwarranted disparities," and "promotes

[3] 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. *Beach Communications,* 508 U.S. at 315; *Lazy Y Ranch*, 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 Ranch,* 546 F.3d at 590-591.

conformity with the new guideline range and avoids undue complexity and litigation." U.S.S.G. app. C, amend. 759, Reason for Amendment at 420. Second, the Sentencing Commission was "concerned that retroactively amending the guidelines could result in a windfall for defendants who had already received a departure or variance, especially one that took into account the disparity in treatment between powder and crack cocaine." *United States v. Davis*, 739 F.3d 1222, 1225 (9th Cir. 2014). The district court held that both of these reasons were sufficient to survive rational basis review, even though there may have been an "imperfect fit between the means and the ends." ER-BGJM 32-36.

There are multiple problems with the Sentencing Commission's assertion that a blanket prohibition on retroactive sentence reductions for all below-guideline non-cooperating offenders is a rational means of (1) avoiding unwarranted disparities; (2) promoting conformity with the new guideline range; or (3) avoiding undue complexity and litigation. As described above, and as recognized by the district court in the hypothetical the court itself created, the blanket prohibition does not avoid unwarranted disparities; it creates them. The blanket prohibition upsets the relationship of the sentence to the guideline range, which was a key aspect of the sentencing determinations made by the original sentencing judges in balancing the §3553(a) factors. The creation of disparity is not incidental to the manner in which

§1B1.10 works. It is the necessary result of excluding from sentencing reductions those persons who previously received below-guideline sentences. The purpose of avoiding unwarranted disparity is *not* to have offenders all have the same or similar sentences. The goal, as stated by Congress, is "avoiding unwarranted sentencing disparities" among defendants with similar records who commit similar offenses "while maintaining sufficient flexibility to permit individualized sentencing decisions." 28 U.S.C. §991(b). The Sentencing Commission's rule need not be a perfect fit, but here the blanket prohibition creates an irrational classification that does not further the goal of avoiding unwarranted disparities – in effect, the rule institutionalizes unwarranted disparities by eliminating or reducing warranted differences in individual sentences.

The stated goal of "promoting conformity with the new guideline range" has a different problem. The Equal Protection Clause requires that an agency's action be related to a legitimate state objective. *Heller*, 509 U.S. at 324. "Promoting conformity with the new guideline range" is not a legitimate state objective. In the post-*Booker* age when the advisory guidelines are one factor the court must consider under §3553(a), it is not a legitimate goal to attempt to make the guideline range more important than any of the other factors or to condense individual variations in sentences to be closer to that range. *Booker*, 543 U.S. at 244 (opinion of Breyer, J.,

construing the guidelines to be advisory). The guidelines are the initial benchmark, or the starting point, for a district court in determining a sentence "sufficient, but not greater than necessary" to fulfill the purposes of sentencing set out in §3553(a). *Gall,* 522 U.S. at 49 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); *Carty*, 520 F.3d at 991. But the guidelines are only one of the §3553(a) factors and are entitled to no more weight than any of the others. The en banc Court in *Carty* held this explicitly:

> Nor should the Guidelines factor be given more or less weight than any other. While the Guidelines are to be respectfully considered, they are one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence.

Carty, 520 F.3d at 991 (citing *Gall,* 512 U.S. at 49-50) ("In doing so, [the district judge] may not presume that the Guidelines range is reasonable."). Thus the Sentencing Commission's stated goal of "promoting conformity with the new guideline range" at the expense of the §3553(a) balancing done by the original sentencing court is an illegitimate goal. If the original sentencing court, properly taking into account all relevant factors including the then-existing guideline range, determined that one defendant should receive a two-level below-guideline sentence and another should not, the Sentencing Commission cannot legitimately seek to

promote conformity with the new guideline range by making only the defendant with the higher sentence eligible for a reduction.

The other two parts of the Sentencing Commission's explanation for the blanket rule against consideration for both departures and variances are to "avoid litigation" and "avoid undue complexity." Here the Sentencing Commission's classification again runs afoul of *Lazy Y Ranch* and *City of Cleburne*. That is, while the relationship between the stated goal and the action taken by the Commission need not be a perfect fit, it also cannot be "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446; *Lazy Y Ranch*, 546 F.3d at 589.

The problem is that the stated rationales of "avoiding litigation" and "avoiding undue complexity" are so broad that virtually any action taken by the Commission could be argued to meet them. The Commission could, for example, allow sentence reductions only for defendants whose last names begins with the letter "A," or defendants born on a certain day of the month. Such classifications would certainly further the purposes of avoiding litigation and undue complexity. They would not, however, be rational. Under the cases cited above – *Dunn*, *Myers*, and *Jonah R.* – sentencing consideration cannot be granted to less deserving defendants while withholding eligibility from more deserving ones.

An additional problem with the rationale is that there was not actually excessive litigation or undue complexity under the previous version of §1B1.10(b)(2). Although there had been some litigation to establish the process for retroactive sentence reductions under the pre-2011 version of §1B1.10(b)(2), by 2011 the process was well established and simple. The pre-2011 version of §1B1.10(b)(2) provided:

> 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 Mar. 3, 2008).

Although this language distinguishes between defendants who had previously received downward departures as opposed to defendants who had originally received downward variances, case law had clarified that retroactive reductions were available to both. Courts did not interpret the phrase "generally would not be appropriate" to be an outright prohibition and frequently re-imposed variances unless the reason for and extent of the variance was accounted for by the retroactive amendment. In *United States v. Sipai*, this Court explicitly held that district courts had discretion to re-impose previously granted variances in retroactive sentence

reduction proceedings under the pre-2011 version of U.S.S.G. §1B1.10(b)(2). 623 F.3d 908, 910 (9th Cir. 2010) ("By stating that the policy statement is 'generally' not applicable this leaves discretion with the district judge to determine its applicability."); *see also United States v. Curry*, 606 F.3d 323, 327-329 (6th Cir. 2010) (district court had discretion to apply retroactive amendment when the previous variance was not based on disagreement with drug quantity table); *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. 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."); *United States v. Porter*, No. 03-CR-00910-CPS, 2009 WL 455475, *3 (E.D.N.Y. Feb. 23, 2009) (declining to reduce sentence because court "took into account the disparity"). Thus by 2011 it was clear that courts in retroactive sentence reduction proceedings could continue to incorporate previous downward departures and variances except for those cases where the basis of the downward variance was disagreement by the district judge with the offense level affected by the guideline amendment.

This leads to the Sentencing Commission's "windfall" concern. The "windfall" concern was that some defendants might receive a double-reduction if the reason their sentence was below the guidelines in the first place was the same as the reason the guideline was amended. *Davis*, 739 F.3d at 1225. In those cases, awarding a retroactive sentence reduction would give the defendant a reduction that the sentencing judge had essentially already given. The same problem exists with the Sentencing Commission's "windfall" concern as exists with the litigation and complexity concern: The Sentencing Commission had no evidence that "windfalls" were actually a problem under previous versions of §1B1.10(b)(2).[4] Indeed, the evidence was that no stakeholders in the criminal justice system considered them to be.

Both the defense bar and the Department of Justice advised the Sentencing Commission in public hearings that these "windfall" concerns were unfounded and that, at most, a minor adjustment in §1B1.10 was necessary. The testimony was that, under the discretionary post-*Booker* sentencing system, judges were required to consider the guideline range in weighing the §3553(a) factors, that departures on the basis of policy disagreements with the guidelines were rare, and that the parties and

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[4] And, of course, the district judge could simply exercise discretion under §3553(a) to deny the sentence reduction if it had already considered the issue.

judges were already addressing that issue when it did arise.[5] The stakeholders suggested that the Commission should either delete the provision discouraging further reductions in the case of a pre-existing variances or revise the language to address its windfall concern more precisely. Instead the Commission created its rule with a stated rationale of "preventing windfalls" when there was no evidence before it that windfalls were a legitimate concern or that amendments were needed to prevent them. Similarly, the Sentencing Commission was not presented with complaints that §1B1.10(b)(2) had proven too complex or caused too much litigation.

The fact that the Sentencing Commission created its massively over-inclusive rule to fix problems that did not exist renders the blanket rule irrational. In *Lazy Y Ranch,* this Court made clear that, under a rational basis test, the challenging party "can rebut the facts underlying [the] asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose." *Lazy Y Ranch*, 546 F.3d at 590-591.

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[5] *See* Transcript of Public Hearing Before the U.S. Sentencing Commission at 49-52, 59-60, 61-62, 93, 101-12 (June 1, 2011); 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).

In *Lazy Y Ranch*, the plaintiff ranch had been denied a contract for grazing rights on Idaho state lands, despite being the high bidder. The state asserted that the reason for the denial was that the administrative costs of its bid were too high. The ranch filed suit under the Equal Protection Clause, claiming that the leases were being denied because the ranch allied itself with conservation groups. The suit claimed that the state did not use administrative costs as a reason to deny leases to other ranchers who were not associated with conservationists. This Court held that inquiry was permitted into whether the stated rational basis for the Idaho state action was actually true – that is, whether leases to Lazy Y carried higher administrative costs. *Lazy Y Ranch*, 546 F.3d at 591.

The present situation, then, is that the Sentencing Commission stated certain problems that its guideline amendment would remedy – avoiding complexity, avoiding litigation, avoiding windfalls – despite a lack of evidence that those problems existed on any real scale, or that any wholesale revision to §1B1.10(b)(2) to tie judges' hands was needed as a remedy. The rational basis test, deferential though it may be, nonetheless requires that there be sufficient connection between the action and the goal that the classifications are not arbitrary. The rational basis test also requires that the court inquire into the action taken by the agency to be sure there is "some footing in the realities of the subject addressed by the legislation."

Heller, 509 U.S. at 21. Here the agency action is not rooted in reality, the connection between the action and the goal is insufficient, and the result is arbitrary.

III. DUE PROCESS PROHIBITS RETROACTIVE APPLICATION OF THE CURRENT VERSION OF U.S.S.G. §1B1.10(B)(2)(A) TO MR. PADILLA-DIAZ AND MR. HECKMAN, WHO PLED GUILTY UNDER THE PRE-2011 RULE THAT PERMITTED ADHERENCE TO DEPARTURES AND VARIANCES.

This issue applies to Mr. Padilla-Diaz and Mr. Heckman, who pled guilty under the pre-2011 version of §1B1.10(b)(2). Under the Due Process Clause, a later-enacted law cannot disrupt a defendant's settled expectation of eligibility for a discretionary benefit available under the defendant's guilty plea. The version of §1B1.10(b)(2) in effect at the time of these defendants' pleas permitted them to receive retroactive reductions to their sentences, including the variances and departures they sought and received. Applying the later-enacted version of §1B1.10(b)(2) to preclude departures and variances from retroactive reductions would disrupt their settled expectations about the plea and violate due process.

A. When Mr. Padilla-Diaz and Mr. Heckman Entered Their Guilty Pleas, The Guidelines Did Not Prevent The Court From Implementing Variances That The Court Had Originally Granted.

Before November 1, 2011, §1B1.10(b)(2) allowed courts to take previous downward variances into account in resentencing defendants under retroactive guideline amendments. Indeed, throughout its history, §1B1.10 encouraged courts

modifying sentences pursuant to retroactive guideline amendments to incorporate the below-guideline sentence imposed at the original sentencing, just as they would continue to implement any guideline adjustment. Although §1B1.10 was amended several times, the policy statement until 2008 always said that the court "should consider" the sentence it "would have imposed" had the amendment been in effect. U.S.S.G §1B1.10(b) (2006); U.S.S.G. §1B1.10(b) (1989). In 1994, the Commission deleted a limitation that the reduction "may not exceed the number of months by which the maximum of the guideline range . . . has been lowered," U.S.S.G. app. C amend. 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. C amend. 548.[6]

The Commission overhauled §1B1.10 when it reduced the crack guidelines by two levels in 2008. As set out above, the 2008 version continued to permit reductions that included both departures and variances, although it discouraged variances as "generally . . . not appropriate." U.S.S.G. §1B1.10(b)(2)(B) (effective

[6] These amendments only discussed departures, not variances, because the Sentencing Guidelines were then mandatory and a sentencing court could only impose a below-guideline sentence by departing.

March 3, 2008). Following the historical principle that sentence reduction courts should adhere to previous guideline decisions and substitute only the retroactive amendment, courts frequently re-imposed variances unless the reason for and extent of the variance was accounted for by the amendment. *Sipai*, 623 F.3d at 910; *see supra* at 37-38.

Effective November 1, 2011, the Sentencing Commission amended U.S.S.G. §1B1.10(b)(2) to its present form. The Commission retained the rule that courts should determine the extent of the reduction by substituting only the amended guideline, as though it "had been in effect at the time the defendant was sentenced," and leaving "all other guideline application decisions unaffected." U.S.S.G. §1B1.10(b)(1) & cmt. n.2. But the Commission then departed from all previous policy statements on retroactive amendments by purporting to ban reductions from including departures and variances other than for substantial assistance. This Court should construe the policy statement to apply only prospectively for defendants who entered their pleas before November 2011, because they presumed that any sentence reduction motion would proceed under the prior version of §1B1.10, which had always allowed departures and variances.

B. Applying The Current Version Of U.S.S.G. §1B1.10(b)(2)(A) Retroactively Violates Due Process Because It Denies Mr. Padilla-Diaz And Mr. Heckman The Benefits They Expected To Receive Under Their Plea Agreements.

In Mr. Padilla-Diaz's case, the government's agreement to recommend a three-level downward variance was an essential part of the inducement for him to enter his plea agreement. In Mr. Heckman's case, the ability to request and to receive a four-level downward departure was an essential part of his inducement to enter the plea agreement. In addition, both plea agreements expressly contemplated that the defendants would be able to take advantage of future retroactive amendments to the guidelines. *See* ER-APD 78, ER-JH 103 (excluding from appellate waiver the right to file a motion "as provided in . . . 18 U.S.C. §3582(c)(2)"). At the time they entered these agreements, U.S.S.G. §1B1.10 would have allowed them to seek retroactive reductions that included the downward variances and departures. They gave significant consideration for these benefits, including a waiver of trial and appellate rights as well as the certainty of lengthy prison sentences.

The Due Process Clause of the Fifth Amendment forbids Congress from enacting retroactive legislation when the "retroactive application [of the statute] is so harsh and oppressive as to transgress the constitutional limitation." *United States v. Carlton*, 512 U.S. 26, 30 (1994) (quoting *Welch v. Henry*, 305 U.S. 134 (1937)).

Among the interests protected by due process are "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1999); *accord Lynce v. Mathis*, 519 U.S. 433, 439 (1997) ("The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen."); *see also Cort v. Crabtree*, 113 F.3d 1081, 1083-86 (9th Cir. 1997) (the presumption against retroactive legislation "embodies a legal doctrine centuries older than our Republic"). Restricting the 2011 amendment to §1B1.10 to prospective application is necessary to "protect[] the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf*, 511 U.S. at 266; *see also Cort*, *supra* (Bureau of Prisons regulation could not apply retroactively to disqualify prisoners from "settled expectations" of eligibility for discretionary sentence reduction).

The terms of plea agreements should be liberally enforced. *See Santobello v. New York*, 404 U.S. 257, 261-262 (1971); *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc); *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003). As *Santobello* held, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262; *Brown*,

337 F.3d at 1159. The focus is on what the defendant understood the promises to be. *United States v. De la Fuente*, 8 F.3d 1333, 1337 n. 7 (9th Cir. 1993) ("Focusing on the defendant's reasonable understanding also reflects the proper constitutional focus on what induced the defendant to plead guilty"); *Brown*, 337 F.3d at 1159-1160.

The defendants pled guilty believing that they would be eligible *both* for current departures and variances *and* for future reductions if or when the sentencing guidelines applicable to them were amended to reduce their guideline ranges. Applying the current version of §1B1.10(b)(2)(A) to undermine their reasonable expectations when they entered their plea would violate fundamental principles of fairness.

Carlton holds that when a statute is explicitly made retroactive, due process requires that (1) the statute be a rational means to accomplish a legitimate legislative purpose, (2) the period of retroactivity must be moderate and "confined to short and limited periods required by the practicalities of national legislation," and (3) the legislation must not impose severe consequences on the parties' interests in fair notice and repose. *Carlton*, 512 U.S. at 31-32; *see also United States v. Ubaldo-*

Figueroa, 362 F.3d 1042, 1052-1053 (9th Cir. 2004) (Pregerson, J., concurring).[7] With respect to the first of these tests, the constitutionality of retroactive legislation is "conditioned on a rationality requirement beyond that applied to other legislation." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring). The previous section of this brief explained that there is no rational basis at all, much less to a standard "beyond that applied to other legislation," for denying the full extent of the retroactive sentencing reduction to the offenders who previously received downward departures and variances. The denial of the reduction fails the rationality requirement under the first prong of the *Carlton* test.

With respect to the second requirement, that the period of retroactivity be short, Justice O'Connor has noted that "in every case where we have upheld a retroactive federal tax statute against a due process challenge … the law applied retroactively for only a relatively short period prior to enactment." *Carlton*, 512 U.S. at 37-38 (O'Connor, J., concurring). Here, the denial of the retroactive

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[7] Although the current U.S.S.G. §1B1.10(b)(2)(A) purports to apply retroactively through Application Note 8, which says that "...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," no statutory authority addresses the due process concerns raised here. Thus, "Congress itself has [not] affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

reduction has no time limitation at all. No matter how long ago a defendant pled guilty in reliance on the settled state of the law and the promises made to him about the consequences of his plea, including sentences imposed pre-*Booker* with guideline-approved departures, the 2011 version of §1B1.10(b)(2)(A) takes that away (except in cases of substantial assistance). *See Ubaldo-Figueroa*, 364 F.3d at 1055 (Pregerson, J., concurring).

With respect to the third part of the *Carlton* test, considering the consequences on the parties' interest in fair notice, reasonable reliance and settled expectations, the Court has focused specifically on this factor in fashioning a strong presumption against retroactivity for statutes that are not explicitly retroactive. *INS v. St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* applied this factor and barred retroactive legislation that impaired a defendant's reasonable expectations upon entering a guilty plea.

In *St. Cyr*, the defendant, a citizen of Haiti, pled guilty to a charge of selling a controlled substance in violation of Connecticut state law. Under the law applicable at the time, he would have been eligible to apply for a discretionary waiver of deportation ("§212(c) waiver"). After his plea, Congress abolished §212(c) waivers. As a result, Mr. St. Cyr and other similarly situated aliens were categorically disqualified from eligibility for relief from removal.

The immigration service commenced removal proceedings against Mr. St. Cyr in 1997, at which time he filed a habeas corpus proceeding asserting, among other things, that application of the new law violated due process because it upset his settled expectations based on his plea agreement. The Supreme Court agreed that Congress had "attached a new disability" that undercut the expectations attached to the guilty plea:

> IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly "'attaches a new disability, in respect to transactions or considerations already past.' …Plea agreements involve a *quid pro quo* between a criminal defendant and the government. … In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous "tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources." There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.

St. Cyr, 533 U.S. at 321-322 (citations omitted). The Court found that such retroactive interference with the expectations of the guilty plea implicated due process concerns:

> The potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like Jideonwo and St. Cyr is significant and manifest. Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in Jideonwo's and St. Cyr's position agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were

> likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would surely be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations," [*Landgraf*, 511 U.S. at 270], to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief.

St. Cyr, 533 U.S. at 323-324 (citations and footnotes omitted). The "clear difference" between certain deportation and the possibility of deportation was sufficient to require that the abolition of §212(c) waivers be construed to apply prospectively only to defendants who entered guilty pleas after the law took effect. *St. Cyr*, 533 U.S. at 325-26.

Accordingly, the Court held that §212(c) relief must remain available for aliens who would have been eligible for relief under the law in effect at the time of their plea. *St. Cyr*, 533 U.S. at 326. The Ninth Circuit has extended *St. Cyr* to cases where the defendant did not plead guilty, but agreed to a stipulated facts trial, on the ground that the defendant gave up a number of rights in reliance on the state of the law with regard to §212(c) waivers. *Tyson v. Holder*, 670 F.3d 1015, 1019-20 (9th Cir. 2012). The focus of *Tyson*, as with *St. Cyr*, was that the defendant made the choice to waive constitutional rights based on reasonable expectations of the consequences of doing so. *Tyson*, 670 F.3d at 1020 (Tyson "was (retroactively) deceived as to what was riding on the roll of the dice").

This Court should also be informed by the lengthy and compelling concurring opinion by Judge Pregerson in *Ubaldo-Figueroa*, 364 F.3d at 1051-1056. In that opinion, Judge Pregerson examined the *Carlton* factors in detail with regard to an explicitly retroactive immigration statute and opined that retroactive application violates due process because "retroactively increasing the legal consequences to be borne by an illegal alien who enters a guilty plea … contravenes elementary considerations of fairness [that] dictate that individuals have a right to know what the law is and conform their conduct accordingly." *Ubaldo-Figueroa*, 364 F.3d at 1056 (Pregerson, J., concurring) (citing *Landgraf*, 511 U.S. at 265). Judge Pregerson's opinion not only follows *St. Cyr* in recognizing the severe unfairness to a criminal defendant when, after his plea, a retroactive law changes the reasonable expectations on which the plea is based, but it also describes how *Carlton*'s first two factors – the lack of a rational government purpose in making the law retroactive and the lack of a temporal limitation on the period of retroactivity – are violated when the retroactive law is applied in a criminal context. *Ubaldo-Figueroa*, 364 F.3d at 1053-1056 (Pregerson, J., concurring).

St. Cyr and its progeny establish that a later-enacted law cannot be applied to deprive a defendant of the settled expectations that induced his plea, including expected eligibility for discretionary benefits in a potential future proceeding. *St.*

Cyr governs the present case. At the time of his plea, these defendants had explicitly bargained both for the ability to seek downward departures and variances and the ability to seek retroactive reductions in the event the guidelines were later amended. As in *Cort*, they expected to be eligible for "consideration" for a retroactive sentence reduction. Applying the later-enacted amendment to §1B1.10(b) to prohibit the district court from re-imposing the §3553(a) variances that were available at the time of their pleas, and which were an explicit bargained-for benefit in their plea agreement, would create serious constitutional issues of notice and fairness. The Court should apply the limitation only prospectively and hold that its retroactive application under the circumstances of these cases would violate due process.

The district court that denied the retroactive reductions to Mr. Padilla-Diaz and Mr. Heckman on this ground did so erroneously, asserting that their expectation of receiving the benefit of a retroactive sentence reduction was less settled than was St. Cyr's expectation of a §212(c) waiver: "[G]iven the history of retroactivity under prior amendments, nothing about Defendants' future prospects for retroactivity were clear." ER-APD 3, ER-JH 3. But the district court did not cite any authority for the proposition that *St. Cyr* requires a particular degree of certainty about future eligibility.

The issue in *St. Cyr* was not whether the prospect of receiving a §212(c) waiver was certain; indeed, the Supreme Court made clear that it was not certain because granting of §212(c) waivers fell within the discretion of immigration judges. The issue in *St. Cyr* was whether the possibility of future benefit had been part of what induced the defendant to give up his rights and plead guilty. As stated in *St. Cyr*, it was the "clear difference between certain deportation and the possibility of deportation" that had influenced the defendants' decision to enter their pleas. 533 U.S. at 325. *St. Cyr* is indistinguishable from the present cases in that regard. No one had promised these defendants that the guidelines would later be retroactively amended (although it was a very real possibility at the time, considering the recent amendments to the crack cocaine guidelines). But under the laws in place, specifically §1B1.10(b) and 18 U.S.C. §3582(c), along with the explicit language of their plea agreements, they reasonably believed that they would be eligible to have their sentences reduced if the guideline range applicable to them was retroactively amended before their sentences expired. The fact that the possibility of a future retroactive amendment was not certain at that point does not affect the *St. Cyr* analysis if an expectation grounded in existing law regarding a potential amendment was part of what induced their guilty pleas. Changing §1B1.10 to eliminate a hoped-for benefit after they had relied on it does what *Tyson* forbade; it leaves them

"(retroactively) deceived as to what was riding on the roll of the dice." *Tyson*, 670 F.3d at 1020.

CONCLUSION

Retroactive application of §1B1.10(b)(2)(A), which would nullify the downward variances and departures these defendants received would violate a range of statutory and constitutional interests. The Court should hold that §1B1.10(b)(2)(2011) is invalid for conflicting with the Commission's statutory directive, for failure to provide equal protection, and, in the cases of Mr. Padilla-Diaz and Mr. Heckman, for violation of due process. The cases should be remanded to the sentencing judge for exercise of full discretion under §3553(a) to grant a sentence reduction within the guideline range as determined after incorporating Amendment 782 and all previously granted departures and variances.

Dated this the 10th day of March, 2016.

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/s/ Elizabeth G. Daily
Elizabeth G. Daily
Attorney for Defendants/Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**Nos. 15-30279, 15-30294,**
	)	**15-30375, 15-30376**
v.	)	
	)	
ARMANDO PADILLA-DIAZ,	)	
JEFFREY HECKMAN JR.,	)	
BERNARO CONTRERAS GUZMAN,	)	
and JOSE MORALES,	)	
	)	
Defendants-Appellants.	)	

STATEMENT OF RELATED CASES

I, Bryan E. Lessley, undersigned counsel of record for defendants-appellants, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that the following cases should be deemed related. *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; U*nited States v. Edwin Magana-Solis,* No. 15-30352; *United States v. Diego Bermudez-Ortiz,* 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. 16-3000; *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; *United States v. Aguilar-Sahagun*, No. 16-30041, and *United States v. Mahan*, No. 15-30365.

DATED: March 10, 2016

/s/ Bryan E. Lessley
Bryan E. Lessley
Attorney for Defendants-Appellants

UNITED STATES COURT OF APPEALS
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	)	
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,170, excluding the parts of the brief exempted by Fed. R. App. B. 32(a)(7)(B)(i).

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

DATED this 10th day of March, 2016.

/s/Bryan E. Lessley
Brian E. Lessley
Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2016, I electronically filed the foregoing 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 further 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/ Annalee Love
Annalee Love