

No. 15-30229

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT BRITO,

Defendant-Appellant.

**Appeal from the United States District Court
for the District of Oregon
Portland Division**

OPENING BRIEF OF APPELLANT

**Stephen R. Sady
Chief Deputy Federal Public Defender
Elizabeth G. Daily
Research & Writing Attorney
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123**

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Statement of Jurisdiction.....	1
Statement of Issues.....	2
Statement of the Case.....	3
Nature of the Case.....	3
Relevant Facts And Procedural History.....	3
A. The Original Sentence Included Four-Months Of Time Served On A State Case.	3
B. After Mr. Brito’s Guideline Range Was Retroactively Reduced, He Requested A Sentence Reduction That Included The Four- Month Adjustment To Account For State Custody Time.	5
C. The District Court Found That It Lacked Jurisdiction To Grant The Full Requested Reduction Because The Four-Month Adjustment Did Not Implement A Concurrent Sentence.	6
Standard of Review	7
Custody Status.....	8
Summary of Argument	8
Argument.....	10
I. Because Adjustments 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 Adjustment In The Sentence Reduction.	10

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.”	11
B.	The Sentencing Judge Has Statutory And Inherent Authority To Run Sentences Concurrently With Other Sentences, Including By Subtracting Periods of Concurrency From The Term Of Imprisonment Imposed To Implement The Full Federal Sentence.....	12
C.	The Original Sentence Imposed In This Case Achieved A Concurrent Sentence.....	16
D.	The Plain Meaning Of “Amended Guideline Range” To Include Concurrency Avoids Serious Constitutional Problems.....	21
E.	Because The Requested 66-Month Sentence Incorporates Four Months Of Concurrent State Time, The Reduced Sentence Would Fall Within An Amended Guideline Range Of 70 To 87 Months.....	22
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.....	24
A.	Adjustments To Effect Concurrent Sentences Are Necessary To Meet The Purposes Of Sentencing.....	25
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.	26
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.	31
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.	34
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.....	35
B. Arbitrary And Irrational Treatment Based On Timing And Sequence Of Prosecution Has No Legitimate Justification.	38
Conclusion	40
Statement of Related Cases.....	42
Certificate of Compliance	43
Certificate of Service	44
Appendix of Statutory and Administrative Provisions	

TABLE OF AUTHORITIES

FEDERAL COURT CASES

<i>Berger v. City of Seattle</i> , 569 F.3d 1029 (9th Cir. 2009) (en banc)	7
<i>Chapman v. United States</i> , 500 U.S. 453 (1991).....	34
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	35
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384 (1990).....	8
<i>Dillon v. United States</i> , 560 U.S. 817 (2010).....	31
<i>Dunn v. United States</i> , 376 F.2d 191 (4th Cir. 1967)	36
<i>FCC v. Beach Communications, Inc.</i> , 508 U.S. 307 (1993).....	38
<i>Gall v. United States</i> , 552 U.S. 38 (2007).....	25
<i>Jonah R. v. Carmona</i> , 446 F.3d 1000 (9th Cir. 2000)	35
<i>Koon v. United States</i> , 518 U.S. 81 (1996).....	8
<i>Lazy Y Ranch v. Behrends</i> , 546 F.3d 580 (9th Cir. 2008)	35, 38
<i>Mellouli v. Lynch</i> , 135 S. Ct. 1980 (2015).....	34

<i>Miranda v. Anchondo</i> , 684 F.3d 844 (9th Cir. 2012)	7
<i>Myers v. United States</i> , 446 F.2d 232 (9th Cir. 1971)	36
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	21
<i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337 (1997).....	21
<i>Schleining v. Thomas</i> , 642 F.3d 1242 (9th Cir. 2011)	16
<i>Setser v. United States</i> , 132 S. Ct. 1463 (2009).....	8, 12
<i>Stinson v. United States</i> , 113 S. Ct. 1913 (1993).....	25
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	17, 27
<i>United States v. Buckland</i> , 289 F.3d 558 (9th Cir. 2002) (en banc)	21
<i>United States v. Carty</i> , 520 F.3d 984 (9th Cir. 2008) (en banc)	25
<i>United States v. Drake</i> , 49 F.3d 1438 (9th Cir. 1995)	9, 14, 15, 22
<i>United States v. Fay</i> , 547 F.3d 1231 (10th Cir. 2008)	17, 20
<i>United States v. LaBonte</i> , 520 U.S. 751 (1997).....	25

<i>United States v. Malloy</i> , 845 F. Supp. 2d 475 (N.D.N.Y. 2012)	22, 23, 24
<i>United States v. Pedrioli</i> , 931 F.2d 31 (9th Cir. 1991)	13
<i>United States v. Reid</i> , 566 F. Supp. 2d 888 (E.D. Wis. 2008)	27
<i>United States v. Swank</i> , 676 F.3d 919 (9th Cir.2012)	7
<i>United States v. Tercero</i> , 734 F.3d 979 (9th Cir. 2013)	31
<i>United States v. Trimble</i> , 487 F.3d 752 (9th Cir. 2007)	34
<i>United States v. Turnipseed</i> , 159 F.3d 383 (9th Cir. 1998)	17, 18, 19, 20
<i>United States v. Watts</i> , 910 F.2d 587 (9th Cir. 1990)	21
<i>United States v. Wilkerson</i> , No. 00-CR-10426-MLW, 2010 WL 5437225 (D. Mass. Dec. 23, 2010)	27
<i>United States v. Wills</i> , 503 U.S. 329 (1992).....	36
<i>United States v. Wilson</i> , 533 U.S. 678 (2001).....	21
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).....	21

FEDERAL STATUTORY AUTHORITIES

18 U.S.C. §§ 3231	1
18 U.S.C. § 3553(a)	passim
18 U.S.C. § 3582(c)	passim
18 U.S.C. § 3584	12, 26
18 U.S.C. § 3585(b)	13, 16, 19
18 U.S.C. § 3742(a)(1)	1
28 U.S.C. § 991(b)	24, 31, 34
28 U.S.C. § 1291	1

FEDERAL RULES AND REGULATIONS

76 Fed. Reg. 24960 (May 3, 2011)	28
76 Fed. Reg. 41332 (July 13, 2011)	30
Fed. R. App. P. 4(a)	1, 12, 40
U.S. Sentencing Guidelines Manual § 1B1.10	passim
U.S. Sentencing Guidelines Manual § 2D1.1	3, 5
U.S. Sentencing Guidelines Manual § 5G1.3	passim
U.S. Sentencing Guidelines Manual § 5K2.23	14, 23

STATEMENT OF JURISDICTION

Gilbert Brito 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. The district court granted the motion in part and denied the motion in part in an opinion and order entered on July 14, 2015. Mr. Brito filed a timely notice of appeal pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure on July 28, 2015. The district court had jurisdiction to decide the extent of its authority to reduce Mr. Brito's sentence under 18 U.S.C. §§ 3231 and 3582(c)(2). This Court has jurisdiction to review the partial 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. Brito 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. Brito's original sentence included a four-month downward adjustment to make the federal sentence run concurrently with a state sentence for violating post-prison supervision. In ruling on the motion for reduction of sentence, the district court granted Mr. Brito's sentence reduction in part, but concluded that it had no authority to incorporate the four-month concurrency adjustment in the sentence reduction. The questions presented are:

Given that adjustments to achieve concurrency implement the full federal sentence, did the district court have authority under 18 U.S.C. § 3582(c)(2) and the retroactivity policy statement to incorporate the concurrency adjustment in the sentence reduction?

In the alternative, if "amended guideline range" in the retroactivity policy statement is interpreted to exclude concurrency adjustments, does the policy statement violate statutory directives to avoid unwarranted disparity in imposing sentence because it makes the duration of imprisonment 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 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 partial denial of a motion to reduce sentence under 18 U.S.C. § 3582(c)(2) entered on July 14, 2015, by the Honorable Michael W. Mosman, United States District Judge for the District of Oregon.

Relevant Facts And Procedural History

A. The Original Sentence Included Four-Months Of Time Served On A State Case.

On September 12, 2012, Gilbert Brito entered a plea of guilty to a single count of possessing with intent to distribute heroin. ER 104. The presentence report (PSR) determined that Mr. Brito's relevant conduct involved 132.97 net grams of heroin. SER 5. The PSR determined that the base offense level under the Drug Quantity Table in U.S.S.G. § 2D1.1(c) was 26, and recommended adjustments resulting in a total offense level of 25. SER 5-6. Combined with his criminal history category of IV, the PSR arrived at an advisory guideline range of 84 to 105 months. SER 9.

In the plea agreement, the parties agreed to recommend a sentence of 80 months in prison, which included a four-month downward variance from the guideline range based on the defendant's swift resolution of the case by guilty plea. ER 93; ER 90. Before sentencing, the defense modified its recommendation from 80 months to 76 months to account for four months Mr. Brito served in state custody

that would not be credited toward his federal sentence. ER 62. As explained in the defense sentencing letter, the adjustment would achieve a concurrent sentence:

Mr. Brito received a 120-day sanction for violating his post-prison supervision in an unrelated Oregon case. That sanction has now been fully served – and Mr. Brito is currently in exclusive feder[al] custody. As sentences are calculated by the [Bureau of Prisons], Mr. Brito will not receive credit for those four months against his federal sentence. We urge the Court to impose an adjusted concurrent sentence (see U.S.S.G. § 5G1.3(c) & app. n. 3) of 76 months to effectively afford Mr. Brito with credit for all of the time in custody since the instant arrest.

ER 62. The government did not take a position on the request for an additional four-month adjustment. ER 79-80. At sentencing, defense counsel clarified that the 76-month sentence would “achieve the [sentence] amount of 80 [months] which we are in agreement about.” ER 81.

The sentencing court adopted the advisory guideline range of 84 to 105 months as recommended in the PSR. ER 82; SER 12-13. The court accepted the defense recommendation to account for the state custody time because it was “time already served essentially for the same criminal conduct.” ER 82. The court imposed a sentence of 76 months in prison followed by a four-year term of supervised release. ER 72-73, 82. In the Statement of Reasons, the court stated that the below-guideline sentence was imposed “pursuant to 18 U.S.C. § 3553(a) factors noted by the parties in their sentencing submissions.”

B. After Mr. Brito's Guideline Range Was Retroactively Reduced, He Requested A Sentence Reduction That Included The Four-Month Adjustment To Account For State Custody Time.

On November 1, 2014, Sentencing Guidelines Amendment 782 went into effect, reducing by two levels most of the base offense levels in the U.S.S.G. § 2D1.1 Drug Quantity Table. U.S.S.G., supp. app'x C, amend. 782 (2014). The Sentencing Commission made Amendment 782 retroactive. U.S.S.G., supp. app'x C, amend. 788 (2014); U.S.S.G. § 1B1.10(d). On April 22, 2015, Mr. Brito filed a motion to reduce his sentence under Amendment 782. The parties and the sentencing judge agreed that, after applying Amendment 782, Mr. Brito's base offense level is 24, his total offense level is 23, and his guideline range is now 70 to 87 months. ER 3, 45.

Mr. Brito's motion to reduce his sentence requested an amended sentence to 66 months, the low-end of the guideline range as adjusted by four months to achieve concurrency with the state sentence. ER 54-61. Mr. Brito argued that an adjustment to achieve concurrency effectuates the full federal sentence by incorporating state custody time. ER 57. Thus, Mr. Brito argued that reducing his sentence to 66 months was consistent with the retroactivity policy statement because it effectuated a within-guideline sentence of 70 months. ER 57-59.

In the alternative, Mr. Brito asserted that interpreting "amended guideline range" in U.S.S.G. § 1B1.10(b)(2)(A) to exclude concurrency adjustments would

violate statutory directives against sentencing policies that create unwarranted disparity. ER 27-34. Further, Mr. Brito contended that such an interpretation would violate the Equal Protection and Due Process Clauses by permitting irrelevant factors to determine a defendant's eligibility for a sentence reduction. ER 34-41.

The government agreed that a reduction to 70 months was appropriate, but argued that a sentence reduction to 66 months would violate the retroactivity policy statement that limits reductions to the low end of the "amended guideline range." ER 45, 52. The government contended that the adjustment could not have implemented a concurrent sentence because it did not fall within the scope of either U.S.S.G. §§ 5G1.3 or 5K2.23, ER 47-50, and because a sentence cannot run concurrently with a completed sentence. ER 10-11.

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

On July 14, 2008, the district court entered an opinion and order granting a sentence reduction to 70 months and denying the further reduction to 66 months. ER 1-6. The judge found that the four-month adjustment was a "downward variance granted to achieve the functional result of a concurrent sentence," but that it could not, in fact, have been a concurrent sentence because the state sentence was completed before the federal sentence was imposed. ER 3-4. The court justified this

distinction based on an analogy to high school students: “[A]n overachieving high school senior who is enrolled in classes both at her high school and at the local community college” could “say that she is enrolled concurrently in high school and college.” But a college student who “learns that the community college will give him credit for several advanced placement classes he completed while in high school” could not claim to be concurrently enrolled because he “was never in any way contemporaneously or simultaneously a student at the high school and the community college.” ER 5.

The Court responded in one sentence to defendant’s statutory and constitutional arguments against the government’s interpretation of “amended guideline range” in the retroactivity policy statement: “With regards to Defendant’s remaining policy and constitutional arguments, I adopt the arguments in the government’s briefing and therefore find no basis in law or fact to grant Defendant the additional 4-month sentence reduction he seeks.” ER 6.

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. Brito is in custody at FCI Berlin serving the 70-month sentence that resulted from the partial grant of the motion to reduce sentence. His projected release date is November 27, 2017.

SUMMARY OF ARGUMENT

Mr. Brito 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 84 to 105 months, down to the new range of 70 to 87 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 four-month concurrency adjustment and, thus, permits a reduction to 66 months.

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 four-month adjustment in this case was a concurrency adjustment because, as the district court stated, the adjustment was intended to achieve the functional equivalent of a concurrent sentence by accounting for Mr. Brito's time in state custody that would not otherwise be credited toward his federal sentence.

An adjustment to achieve a concurrent sentence does not change the length of the federal sentence. By subtracting the time served but not credited, the adjustment merely accounts for the gap created by the Bureau of Prisons' prohibition on credit for multiple sentences. 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 66 months, because it incorporates the four-month adjustment and effectuates a 70-month within-guideline sentence.

In the alternative, the district court's construction of the retroactivity policy statement to prohibit the four-month adjustment 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, especially avoiding unwarranted sentencing disparities. In violation of statute, the policy statement would institutionalize unwarranted disparities based on the timing, length, and sequence of prosecutions. Further, the unequal treatment of similar defendants based on such factors would be arbitrary, and would implicate the guarantee of equal justice under the law. The construction of the retroactive policy statement adopted by the district court therefore violates the Due Process and Equal Protection Clauses.

ARGUMENT

I. Because Adjustments 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 Adjustment In The Sentence Reduction.

The issues on appeal involve the intersection of two areas of statutory and Guidelines law: the limits on the judicial power to grant sentence reductions based on retroactive amendments to the sentencing guidelines; and the judicial authority to impose sentences to run concurrently or consecutively to other sentences. In brief, the requested sentence reduction to 66 months in this case would effect a full federal sentence of 70 months by incorporating four months of concurrent state custody

time. Therefore, the requested reduction would be 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. By amendment in 2011, the Sentencing Commission purported to limit reductions to the low end of the

“amended guideline range,” which the commentary described as excluding most departures and variances.

The parties in this case agree that Mr. Brito meets the requirements for a sentence reduction because Amendment 782 reduced his applicable guideline range. The only issue is whether the provision limiting reductions to the minimum of the “amended guideline range” includes the four-month adjustment.

B. The Sentencing Judge Has Statutory And Inherent Authority To Run Sentences Concurrently With Other Sentences, Including By Subtracting Periods of Concurrency From The Term Of Imprisonment Imposed 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 18 U.S.C. § 3584 (Appendix 2). In addition to that statutory authority, 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.

Whether the court is exercising its statutory or inherent concurrency power, the mechanism for achieving a concurrent sentence will differ depending on the timing of the prosecution in each jurisdiction. 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). To assure that a judge's concurrency decision will be implemented, the Sentencing Commission created two mechanisms for achieving concurrency: U.S.S.G. §§ 5G1.3 and 5K2.23. However, the judicial power to run a prior sentence concurrently is 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); *see also Setser* 132 S. Ct. at 1468 (recognizing concurrency “concerns a matter of discretion traditionally committed to the Judiciary”).

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. 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 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).

Accordingly, a sentence that requires an adjustment, departure, variance, or any other mechanism to achieve concurrency has not been decreased; it has simply been deemed to run at the same time as another sentence. The 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 at 1441.

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.¹

¹ 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

Combined, these principals establish that federal sentencing judges have broad authority from the Guidelines, statutes, and inherent judicial authority to impose concurrent sentences, including the power to subtract pretrial custody time that will not be credited by the Bureau of Prisons. The adjusted time constitutes part of the full federal sentence.

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

Both the sentencing transcript and the district court's opinion confirm that the court intended the four-month adjustment to effect an 80-month federal sentence, which ran concurrently with the four-month state term that would not be credited by the Bureau of Prisons. *See* ER 3 (stating that the reduction was “granted to achieve the functional result of a concurrent sentence”); ER 82 (explaining court's intent to “take into account by way of reduction of time already served essentially for the same criminal conduct”). Without the adjustment, the Bureau of Prisons would not have credited Mr. Brito with the time in state custody under § 3585(b), and the 80-month sentence would have been de facto consecutive to the state term, resulting in a total of 84 months of imprisonment from the time of arrest.

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.

While agreeing that it intended the four-month adjustment to account for state custody time and to “achieve the functional result of a concurrent sentence,” the district court based its denial of the full reduction on its conclusion that Mr. Brito’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.

The district court relied on *United States v. Turnipseed*, 159 F.3d 383 (9th Cir. 1998), and *United States v. Fay*, 547 F.3d 1231 (10th Cir. 2008), for the proposition that a federal sentence cannot be imposed to run concurrently with a discharged state sentence. Both cases involved legal analyses that have been undermined by intervening Supreme Court decisions, and, in any event, neither case is on point.

Turnipseed was decided before the Supreme Court held that the Guidelines were merely advisory in *United States v. Booker*, 543 U.S. 220 (2005), and as a result, it solely determined the courts’ authority under the relevant Guidelines provision. 159 F.3d at 387. Because the decision preceded *Setser*, the Court did not consider the full range of judicial authority to run sentences concurrently.

Turnipseed is also distinguishable on its facts, and if anything, supports Mr. Brito’s arguments. The defendant in *Turnipseed* was arrested on state charges of assault after he fired a gun toward a group of young men; he received a 366-day state

sentence. 159 F.3d at 384. After he had completed serving the sentence and was released from custody, a federal grand jury indicted him for possession of a stolen firearm based on the same incident. *Id.* The defendant argued that the then-mandatory guideline provision of U.S.S.G. § 5G1.3 required the district court to grant him credit for the time that he served in state custody. *Id.* at 386.

In rejecting that argument, this Court focused on the meaning of “undischarged” in the guideline provision. *Id.* at 386-87. The Court found that the most relevant definition of “discharge” was “to release from confinement,” and the Court concluded that “it would contradict the plain meaning of the term ‘undischarged’” to include the defendant’s state prison term from which he had already been released. *Id.* at 387. The Court bolstered its conclusion with the fact that the “point” of U.S.S.G. § 5G1.3 is to achieve concurrency, whereas, “If a defendant has been released from state prison after having served the term imposed, no term of imprisonment remains with which the federal sentence can ‘run concurrently.’” *Id.* at 387.

Turnipseed is distinguishable from the present case because the defendant in that case completed and was released from his state sentence before he was ever charged and arrested on the federal offense. By contrast, federal charges were lodged against Mr. Brito the day after his arrest. SER 1 (arrest date of June 7, 2012); ER

103 (complaint filed June 8, 2012). The post-prison supervision violation sentence was imposed thereafter. ER 62. Thus, Mr. Brito served the entire state sentence while detained in pretrial custody for his federal charges. ER 104 (order of detention entered July 11, 2012). *Turnipseed* only held that a concurrent sentence was not *required* by U.S.S.G. § 5G1.3(b), but never considered the full scope of judicial authority to impose concurrent sentences. Thus, *Turnipseed* provides no basis to prohibit a concurrent sentence in this case.

The distinction between post-arrest continuous custody and intervening release also erodes the basis for the district court's school analogy. If anything, Mr. Brito was very much the "overachieving high school senior" who simultaneously attended both high school and community college classes. The relevant four-month period occurred after Mr. Brito was arrested on the present offense and ordered detained by the federal court. That time would have accrued against Mr. Brito's federal sentence under 18 U.S.C. § 3585(b) but for the fact that it was first applied to the state sentence.

The district court's high school analogy is inapt, in any event. The concurrency issue involves the crediting of time in custody following arrest toward a guideline sentence. If using an education analogy, the following would illustrate

how the crediting of time by adjusting the federal sentence does not decrease the overall length of the sentence:

Licensing Board requires 15 college-level credits for certification. College provides confirmation of credits to Licensing Board but only counts its own courses. Ambitious Student completes five college-level credits in high school and ten at College. In the face of College's refusal to confirm Ambitious Student's high school work, Licensing Board adjusts the number of required credits of confirmed college-level credits from College to ten, subtracting the five high school credits earned in college-level courses, and grants certification.

Just as the guideline sentence was not reduced by the adjustment for concurrency in the present case, Ambitious Student's certification requirement of 15 college-level credits was not reduced – the five college-level high school credits were an integral part of the certification requirement of 15 college-level credits.

The other opinion relied on by the district court, *Fay*, has been undermined by *Setser*, because the Tenth Circuit rested its holding exclusively on the lack of statutory authority to impose a concurrent sentence. 547 F.3d at 1236. As the district court here noted, *Setser* establishes that the lack of a statutory provision does not establish a lack of inherent judicial authority. ER 4. Like *Turnipseed*, *Fay* is also factually distinguishable because the defendant was never federally arrested or ordered detained while he was serving the state sentence. *Id.* at 1233.

In sum, the district court provided no basis to contradict the inherent judicial authority to impose a federal sentence concurrently with a state sentence served

during pretrial custody on the federal offense, regardless of whether or not that sentence is completed.

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

In this context, the policy statement on retroactive amendments, when referring to “amended guideline range,” incorporates 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)). The Court should find that the plain meaning and context of “amended guideline range” includes the full concurrent sentence. To the extent the policy statement does not expressly incorporate concurrency jurisprudence, the Court should resolve questions in favor of Mr. Brito based on the doctrine of constitutional avoidance, which 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 Sentencing

Guidelines. *See United States v. Watts*, 910 F.2d 587, 592 (9th Cir. 1990). Here, the limitation in § 1B1.10(b)(2)(A) does not expressly or impliedly prohibit adjustments necessary to retain a concurrent, within-guideline sentence, and, to avoid running afoul of the Constitution, the limitation should not be so construed.

E. Because The Requested 66-Month Sentence Incorporates Four Months Of Concurrent State Time, The Reduced Sentence Would Fall Within An Amended Guideline Range Of 70 To 87 Months.

Because the sentences were intended to run concurrently, a sentence reduction to 66 months would incorporate the same four-months of state custody time and, thus, would effectuate a 70-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 66-month requested sentence in this case is within the “minimum of the amended guideline range” because it incorporates the four 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. Brito, 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 twenty-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, 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 four-month state-time adjustment into the reduced sentence. The purpose of the initial adjustment, as in

Malloy, was not to reduce Mr. Brito’s 80-month recommended sentence, but to allow that sentence to run at the same time as the state post-prison supervision violation sentence. As the district court concluded in *Malloy*, incorporating the four-month reduction would not place Mr. Brito’s reduced sentence below the amended guideline range; it would simply preserve the credit he already received. As in *Malloy*, denial of Mr. Brito’s concurrency adjustment would be inequitable.

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*, 113 S. Ct. 1913, 1915 (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 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, amend. 504 (2014). 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, amend. 548.²

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.

² 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.³ 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.⁴

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.⁵ 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.

³ Transcript of Public Hearing Before the U.S. Sentencing Commission at 108 (June 1, 2011).

⁴ *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).

⁵ 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 25 and Criminal History Category III for a guideline range of 70 to 87 months. While the federal case was pending, Defendants B and C each served a 12-month state sentence. The sentencing court determined that all three defendants should receive a low-end sentence of 70 months. Defendant A had no prior sentence and received a sentence of 70 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 12 months of state custody time and adjusted his term of imprisonment to 58 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 70 months without 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 12 months longer.

Pursuant to Amendment 782, each defendant's guideline range was lowered by 13 months, from 70 months to 57 months. If § 1B1.10 prohibits the court from retaining the concurrency adjustment, Defendants A and C would be eligible for a full 13-month reduction, while Defendant B, who sought treatment, would be eligible for a reduction of only one month, thereby transforming his concurrent sentence into a de facto consecutive sentence. As a result, Defendant B would serve one year 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	70	70
Defendant B	12	58 (concurrent)	70
Defendant C	12	70 (consecutive)	82

AMENDMENT 782 SENTENCE ELIGIBILITY			
	State Sentence	Federal Sentence	Total Sentence
Defendant A	0	57	57
Defendant B	12	57 (consecutive)	69
Defendant C	12	57 (consecutive)	69

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, the limitation would conflict with the Sentencing Commission's statutory directive in 28 U.S.C. § 991(b) and 18 U.S.C. § 3553(a) 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 v. Behrends*, 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. So divided, a defendant’s eligibility for a full, two-level sentence reduction would unconstitutionally 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.”).

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 full, 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. Brito's case amply demonstrates the irrationality and arbitrariness of interpreting § 1B1.10(b)(2)(A) to prohibit concurrency adjustments. The low end of Mr. Brito's pre-amendment guideline range called for a sentence of 84 months. The parties agreed to a four-month variance to 80 months, and the Court adopted the unopposed request to adjust the sentence by an additional four months to render the federal sentence concurrent with the state sanction. The extent of the adjustment – four months – depended on factors unrelated to sentencing purposes; it could have been less if he resolved the federal matter faster or the state matter slower, and it would be non-existent if the federal sentence were imposed first. Yet the extent of the adjustment limits Mr. Brito's eligibility 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 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.⁶ 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. To the extent that the Commission believed that a departure or variance reflected a judge simply “ignoring” the guideline range, that view finds no support in the hearing testimony or in the legal

⁶ 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.

requirements requiring courts to use the guideline range as the starting point for imposing sentence. Even if such windfalls had been a problem, 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 make 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 four-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. Brito respectfully requests that the Court reverse the order denying in part the motion to reduce sentence and remand for the

district court to exercise its discretion whether the sentence should be fully reduced to 66 months.

Respectfully submitted this 27th day of October, 2015.

/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. 15-30229
	)	
v.	)	
	)	
GILBERT BRITO,	)	
	)	
Defendant-Appellant.	)	

STATEMENT OF RELATED CASES

I, Stephen R. Sady, undersigned counsel of record for defendant-appellant, Gilbert Brito, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

Dated this 27th day of October, 2015.

/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. 15-30229
	)	
v.	)	
	)	
GILBERT BRITO,	)	
	)	
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 8,837 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 27th day of October, 2015.

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

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2015, 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 (2012)	2
18 U.S.C. § 3585 (2012)	3
U.S.S.G. § 5G1.3 and commentary (2012).....	4
U.S.S.G. § 5K2.23 (2012).....	10
18 U.S.C. § 3582(c)(2) (2014).....	11
U.S.S.G. § 1B1.10 and commentary (2014).....	12

18 U.S.C. § 3584 (2012)

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 (2012)

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. – A 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 (2012)

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) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), 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) (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 (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but 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 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 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 55 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).—

(A) In General.—Under subsection (c), 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 (c), 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 (c) 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 (c) 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 (c) 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 (c), 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(c), rather than as a credit for time served.

4. 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: In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a).

Exercise of that authority, 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).

U.S.S.G. § 5K2.23 (2012)

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) (2014)

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 (2014)

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.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) 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).

(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).

No. 15-30229

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT BRITO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
THE HONORABLE MICHAEL W. MOSMAN
UNITED STATES DISTRICT JUDGE
USDC NO. 3:12-CR-00328-MO-1

ANSWERING BRIEF OF PLAINTIFF-APPELLEE

BILLY J. WILLIAMS
UNITED STATES ATTORNEY
DISTRICT OF OREGON
KELLY A. ZUSMAN
APPELLATE CHIEF
JEFFREY S. SWEET
ASSISTANT UNITED STATES ATTORNEYS
405 E. 8TH AVENUE, SUITE 2400
EUGENE, OREGON 97401
TELEPHONE: (541) 465-6771

TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Jurisdiction.....	1
Issues Presented.....	1
Statement of Facts	2
Summary of Argument.....	4
Standard of Review	6
Argument.....	7
1. The District Court Correctly Cabined Defendant’s Sentence Reduction to the Amended Guideline’s Low-End.....	7
2. Guideline Section 1B1.10 is Lawful and Constitutional	10
A. Section 1B1.10 is consistent with implementing statutes.....	10
B. Guideline § 1B1.10(b)(2)(A) is Constitutional	14
i. Rational basis review applies to this case.....	14
ii. Section 1B1.10’s distinction between variances and substantial assistance departures is rational	16
C. Defendant’s original sentence was reduced by a variance, not a concurrency finding, and thus, his remaining arguments are factually misplaced.....	21
Conclusion	27

Statement of Related Cases	28
Certificate of Compliance	30
Statutory Addendum.....	A-1
18 U.S.C. § 3582.....	A-2
18 U.S.C. § 3584.....	A-4
28 U.S.C. § 991.....	A-5
28 U.S.C. §§ 994(o) and (u)	A-6
U.S.S.G. § 1B1.10.....	A-7
U.S.S.G. § 5G1.3	A-14
U.S.S.G. § 5K2.23	A-18

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Chapman v. United States</i> , 500 U.S. 453 (1991)	17
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297 (1976)	16
<i>Dillon v. United States</i> , 560 U.S. 817 (2010)	passim
<i>FCC v. Beach Communications, Inc.</i> , 508 U.S. 307 (1993)	17
<i>Heller v. Doe</i> , 509 U.S. 312 (1993)	16, 20
<i>Peck v. Thomas</i> , 697 F.3d 767 (9th Cir. 2012)	15
<i>Prescod, Jr. v. Schuylkill</i> , No. 14-3701, 2015 WL 6796787 (3d Cir. Nov. 6, 2015)	25
<i>Romero-Ochoa v. Holder</i> , 712 F.3d 1328 (9th Cir. 2013)	17, 21
<i>United States v. Aragon-Rodriguez</i> , No. 15-50287, 2015 WL 8526249 (9th Cir. Dec. 10, 2015)	8, 9
<i>United States v. Carranza Gonzalez</i> , 3:12-CR-154-SI	10
<i>United States v. Chovan</i> , 735 F.3d 1127 (9th Cir. 2013)	18
<i>United States v. Cruz</i> , 595 F.3d 744 (7th Cir. 2010)	25
<i>United States v. Davis</i> , 739 F.3d 1222 (9th Cir. 2014)	passim
<i>United States v. Deamues</i> , 553 Fed. App'x. 258 (3d Cir. 2014)	19
<i>United States v. Drake</i> , 49 F.3d 1438 (9th Cir. 1995)	26

<i>United States v. Dumas</i> , 64 F.3d 1427 (9th Cir. 1995).....	15, 17
<i>United States v. Fay</i> , 547 F.3d 1231, 1236 (10th Cir. 2008)	25
<i>United States v. Garcia-Uribe</i> , 1:08-CR-30039-PA.....	10
<i>United States v. Johnson</i> , 626 F.3d 1085 (9th Cir. 2010).....	15
<i>United States v. Kuchinski</i> , 469 F.3d 853 (9th Cir. 2014).....	6
<i>United States v. Lucas</i> , 745 F.3d 626, 629 (2d Cir. 2014), <i>cert. denied</i> , 135 S. Ct. 150 (2014)	25
<i>United States v. Mahan</i> , 6:06-CR-60045-AA-1	10
<i>United States v. Malloy</i> , 845 F. Supp. 2d. 475 (N.D.N.Y. 2012).....	26
<i>United States v. Montanez</i> , 717 F.3d 287 (2d Cir. 2013)	12
<i>United States v. Navarro</i> , 800 F.3d 1104 (9th Cir. 2015).....	15, 16, 17
<i>United States v. Parker</i> , 617 Fed. App'x 806 (9th Cir. 2015)	8, 9
<i>United States v. Pulido-Aguilar</i> , 3:10-CR-142-KI	10
<i>United States v. Setser</i> , 132 S. Ct. 1463 (2012)	25, 26
<i>United States v. Stewart</i> , 761 F.3d 993 (9th Cir. 2014).....	14
<i>United States v. Tercero</i> , 734 F.3d 979 (9th Cir. 2013)	passim
<i>United States v. Turnipseed</i> , 159 F.3d 383 (9th Cir. 1998)	24, 26

FEDERAL STATUTES, LAWS & RULES

18 U.S.C. § 3553(a)	passim
18 U.S.C § 3582(c)	passim
18 U.S.C. § 3584	13, 21, 23, 25,26
18 U.S.C. §§ 3742(a)(1) and (2)	1
28 U.S.C. § 1291	1
28 U.S.C. § 991(b).....	10, 11, 12, 13, 18
28 U.S.C. § 994(u).....	7, 11, 12, 13, 14
U.S.S.G § 1B1.10	passim
U.S.S.G § 2D1.1	7
U.S.S.G. § 5G1.3	23, 24
U.S.S.G. § 5K2.23	24

STATEMENT OF JURISDICTION

The district court had jurisdiction over defendant Gilbert Brito's motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). This Court has jurisdiction to review the district court's decision under 18 U.S.C. §§ 3742(a)(1) and (2), and 28 U.S.C. § 1291.

ISSUE PRESENTED

Following his conviction and sentence for heroin trafficking, defendant filed a motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782. The district court reduced defendant's sentence from 76 months to 70 months, the low end of the amended guideline range. The court declined, however, to further reduce defendant's sentence to reflect a downward variance granted at his original sentencing for time served on a fully discharged state conviction. Defendant now appeals, claiming that the court's failure to afford an additional four-month reduction below the amended guideline range is either illegal or unconstitutional.

\\

\\

\\

STATEMENT OF FACTS

In September of 2012, defendant pleaded guilty to possession with intent to distribute 100 grams or more of heroin. ER 98, 104. The relevant and undisputed guideline calculations were as follows:

- Base Offense Level (150–400 grams of heroin) 26
- Possession of a weapon +2
- Acceptance of responsibility -3
- Adjusted Offense Level 25
- Criminal History Category IV
- Advisory Guideline Range 84-105

SER 5, 7, 9 (PSR ¶¶ 26, 27, 33, 41, 56).

The district court adopted the Presentence Investigation Report without change. SER 12. Pursuant to a plea agreement, the parties jointly recommended a 4-month downward variance “in light of defendant’s willingness to resolve this case expeditiously and his acceptance of responsibility for his actions.” ER 90-91. Defendant urged the court to reduce his sentence an additional 4 months to reflect time he “fully served” in state custody for violating the terms of his state post-prison supervision by committing the federal offense. ER 62.

The Government neither joined nor opposed the latter request. ER 62, 79-80.

The district court clarified the basis for the additional 4-month reduction sought, confirming that it was a variance and not a request for concurrency: “Now, just so I’m clear, you’re not asking for concurrent time because the time has run, you’re asking for me to drop four months in order to account for time that’s run; is that right?” ER 80. The judge further stated, “[defense counsel] is asking that I do what’s often done, which is take into account by way of *reduction of time already served* essentially for the same criminal conduct. And so I’m going to do that in this case.” ER 82 (emphasis added). The Statement of Reasons confirmed the judge’s statements at sentencing, setting forth that, “[t]he court imposed a sentence below the advisory range *pursuant to 18 U.S.C. § 3553(a) factors* noted by the parties in their sentencing submissions. SER 14 (emphasis added).

When the Sentencing Commission lowered the drug guidelines by two-levels in 2014 (Amendments 782 and 788), defendant filed a motion asking the court to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). ER 54. The parties agreed—and still agree—that

defendant's amended guideline range is 70 to 87 months. ER 56. Therefore, defendant was eligible for a reduction of up to 6 months. Defendant argues that his sentence should have been reduced by an additional four months by virtue of the reduction he received to achieve the equivalent of a concurrent sentence. ER 57.

The district court partially granted defendant's motion to reduce, and imposed a lower, 70-month sentence. The court declined to reduce defendant's sentence further because (1) the guidelines forbid reductions below the amended guideline range (except in cases involving substantial assistance), and (2) the original 4-month reduction was not truly a concurrent sentence since the "court can only make a concurrency determination if there is a current existing sentence with which the new federal sentence can run concurrently." ER 4, 6. This appeal, challenging the 4-month difference, followed.

SUMMARY OF ARGUMENT

The Supreme Court in *Dillon v. United States*, 560 U.S. 817 (2010), rejected defendant's premise: sentence modification proceedings under 18 USC § 3582(c) are a limited and narrow exception to the general rule that a sentence is final once it is imposed. 560 U.S. at 827.

Sentence reductions under this statute are narrowly circumscribed, and unlike initial sentencing hearings that afford tremendous discretion to a district judge, it is the Sentencing Commission that determines in what circumstances and by what amounts previously imposed sentences may be reduced. *Id.* at 825-26. Although the Commission's methodology must be rational, this Court has already recognized that legitimate reasons undergird the Sentencing Commission's rationale for the manner in which district courts may lower drug guideline sentences.

The statute's plain language, coupled with its implementing guideline § 1B1.10, unequivocally prohibits sentencing reductions below the amended guideline range (except in cases involving substantial assistance). In *Dillon*, the Supreme Court refused to permit a defendant to use a § 3582(c) sentence modification motion to obtain resentencing to correct his original sentence that was imposed under an unconstitutional binding guideline regime, and it strictly limited *Dillon*'s relief to the 2-level reduction applicable to defendants who trafficked in crack cocaine. *Id.* at 817-18. Although *Dillon* addressed an unconstitutional guideline regime and this case raises an alleged

statutory conflict, the result should be the same: the district court correctly refused to reduce defendant's sentence below the amended guideline range.

Moreover, defendant's concurrency arguments fail because he originally received a variance, not a concurrent sentence. Although the variance reflected his fully discharged state sentence, concurrency was impossible. Under the plain language of § 1B1.10 and consistent with binding precedent, the district court properly concluded that defendant was ineligible for a further sentence reduction.

STANDARD OF REVIEW

A district court's ruling on a motion reducing a sentence pursuant to 18 U.S.C. § 3582(c)(2) is reviewed for an abuse of discretion. *United States v. Tercero*, 734 F.3d 979, 981 (9th Cir. 2013). The legality of a Guidelines sentence is reviewed de novo, as are constitutional attacks on the Sentencing Guidelines. *See United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2014).

\\

\\

\\

ARGUMENT

1. The District Court Correctly Cabined Defendant's Sentence Reduction to the Amended Guideline's Low-End.

The Supreme Court has recognized that, as a general rule, sentences are final and may not be modified except in limited circumstances. *Dillon*, 560 U.S. at 819. Guideline reductions that the Sentencing Commission determines should apply retroactively represent one such limited exception, as recognized in 18 U.S.C. § 3582(c) and 28 U.S.C. § 994(u). In Guideline Amendment 782, the Sentencing Commission reduced most offenses on the § 2D1.1 Drug Quantity Table by two levels. In Amendment 788, the Commission stated that Amendment 782 may be applied retroactively to previously sentenced inmates if and when a reduction is “consistent with applicable policy statements issued by the Sentencing Commission.” *Dillon*, 560 U.S. at 826 (quoting 18 U.S.C. § 3582(c)(2)).

Reducing a sentence below the amended guideline range is inconsistent with the Sentencing Commission's policy statements. Section 1B1.10(b)(2)(A) states that when reducing a sentence based upon an amended guideline:

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.

The only exception to the § 1B1.10(b)(2)(A) limitation is when the defendant received a reduction based upon substantial assistance, which is not present in this case. *See* U.S.S.G. § 1B1.10(b)(2)(B).

This Court has consistently held that the limitations within § 1B1.10(b)(2)(A) are enforceable. *See United States v. Davis*, 739 F.3d 1222, 1224-26 (9th Cir. 2014); *Tercero*, 734 F.3d at 981; *United States v. Aragon-Rodriguez*, No. 15-50287, 2015 WL 8526249, at *1 (9th Cir. Dec. 10, 2015); *United States v. Parker*, 617 Fed. Appx 806, 807 (9th Cir. 2015). In *Tercero*, a crack cocaine case involving the retroactive application of the Fair Sentencing Act, the district court refused to lower a defendant's sentence below the amended guideline range because § 1B1.10(b)(2)(A) prohibits it. 734 F.3d at 981. The defendant's original guideline range was 84-105 months; however, the defendant received a downward departure to 72 months based upon § 3553(a) factors. *Id.* at 980. Following an amendment to the sentencing guidelines, the defendant's amended guideline range was 70-87 months.

Id. at 981. This Court held that defendant's sentence could only be reduced by two months under § 1B1.10. *Id.* at 982.

Similarly, in *Davis*, a crack cocaine case in which the defendant's original sentence fell below the amended guideline range, this Court affirmed a district court's ruling denying the defendant's motion to reduce his sentence because § 1B1.10(b) prohibits a reduction below the low-end of the amended guidelines range. 739 F.3d at 1224, 1226. This Court explicitly rejected arguments that § 1B1.10(b) exceeded the Sentencing Commission's authority, conflicted with Congress's directives in 18 U.S.C. § 3553, or violated separation of powers. *Id.* at 1224-26.

Recently, this Court affirmed in unpublished memoranda two similar rulings in which district courts rejected defendants' efforts to apply Amendment 782 to sentence reductions below the amended advisory guideline range. *United States v. Aragon-Rodriguez*, 2015 WL 8526249, at *1 (9th Cir. 2015); *United States v. Parker*, 617 Fed. App'x. 806, 807 (9th Cir. 2015).

Except for a substantial assistance departure, there is no lawful basis for reducing a sentence below the low-end of the amended

guideline range. Because the reduction defendant seeks is based on a § 3553(a) variance he received at his original sentencing, he is ineligible for a corresponding reduction below the low-end of his amended guideline range. The district court's conclusion in this case was sound and consistent with rulings from every judge within this district confronted with similar statutory and constitutional challenges to this guideline provision. *See United States v. Carranza Gonzalez*, 3:12-CR-154-SI (Opinion, Dec. 2, 2015); *United States v. Pulido-Aguilar*, 3:10-CR-142-KI (Opinion, Nov. 5, 2015); *United States v. Mahan*, 6:06-CR-60045-AA-1 (Opinion, Nov. 4, 2015); *United States v. Garcia-Uribe*, 1:08-CR-30039-PA (Opinion, Oct. 6, 2015).

2. Guideline Section 1B1.10 is Lawful and Constitutional

A. Section 1B1.10 is consistent with implementing statutes.

Faced with the prohibition in § 1B1.10, defendant claims that § 1B1.10 is inconsistent with 28 U.S.C. § 991(b) because it fails to afford “sufficient flexibility to permit individualized sentencing decisions.” Appellant's Br. 24. This argument was rejected in *Dillon*, *Tercero* and *Davis*, and it should be rejected in this case because it is contrary to the statute's plain meaning.

In relevant parts, § 991(b) provides that the U.S. Sentencing Commission’s purpose is to establish sentencing policies and practices that effectuate sentencing goals specified in 18 U.S.C. § 3553(a)(2), and to: “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants . . . while maintaining sufficient flexibility to permit individualized sentences” 28 U.S.C. § 991(b)(1)(A) and (B).

Defendant contends that the limits in § 1B1.10 conflict with this flexibility. But this case does not involve an original sentencing hearing, and the Supreme Court in *Dillon* drew a sharp distinction between initial sentencing hearings and sentencing modification proceedings under § 3582(c). *Dillon*, 560 U.S. at 830. Because 28 U.S.C. § 994(u) grants the Sentencing Commission authority to determine “in what circumstances and by what amount” sentences should be reduced by retroactive guideline amendments, and because § 3582(c) restricts sentencing reductions to those “consistent with” the Sentencing Commission’s policy statements, the sentencing statutes contemplate that district courts do not enjoy the same flexibility in

sentence modification proceedings compared with initial sentencing hearings. *Id.* at 821, 830 (quoting 28 U.S.C. § 994(u)).

This Court held that § 1B1.10 does not conflict “with the purpose of the Guidelines.” *Tercero*, 734 F.3d at 983. Noting that the district court considered § 3553(a) factors at Tercero’s sentencing, this Court emphasized (like *Dillon*) that § 3582(c)(2) authorizes a limited adjustment, not a plenary resentencing. *Id.* Thus, it was “inappropriate for us to reweigh the sentencing factors set forth in § 3553(a) to assess the fairness of Tercero’s 70-month sentence.” *Id.* Far from being in conflict with the purposes of sentencing, “the revisions to § 1B1.10 fall squarely within the scope of Congress’s articulated role for the Commission.” *Id.* at 983-84.

Like *Tercero*, this Court in *Davis* found no conflict between § 1B1.10 and § 991(b)(1). 739 F.3d at 1225. “We also reject Davis’s contention that amended § 1B1.10(b) conflicts with Congress’s directive that the Commission promulgate policy statements that will further the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).” *Id.*; see also *United States v. Montanez*, 717 F.3d 287, 294-295 (2d Cir. 2013)). Because this Court has already held that there is no conflict between

§ 1B1.10(b) and the Sentencing Commission's implementing statutes, defendant's arguments should (again) be rejected.

Moreover, § 991(b) applies (by its own terms) to sentencing proceedings under 18 U.S.C. § 3553(a); it has no bearing on sentencing reductions governed by § 3582(c). *See United States v. Forde*, No. 04-CR-0048-10 (JSR), 2012 WL 2045851, at *2 (S.D.N.Y. June 5, 2012). The Commission's authority to enact guidelines to effectuate post-judgment sentence reductions under § 3582(c) is governed by § 994(u). *See Dillon*, 560 U.S. at 825-26.

Defendant fails to identify any specific Congressional directive that the Sentencing Commission must permit courts to reduce sentences below the amended guideline range when a variance was premised on a desire to effectuate a concurrent sentence with a prior, fully discharged state sentence. The guideline permits but one exception—departures premised upon substantial assistance—and it precludes a district court from expanding a simple sentencing modification proceeding into a complicated re-hearing in which the underlying rationale for a variance must be parsed out. And while 18 U.S.C. § 3584 gives a district court discretion to decide how a federal

sentence should be ordered to run relative to other, undischarged sentences, it has no bearing on limited § 3582(c) sentence modifications.

Absent a clear conflict between the guideline and a relevant statute, the guideline's plain language controls. *See, e.g., United States v. Stewart*, 761 F.3d 993, 999 (9th Cir. 2014) (“[T]he Commission may go beyond the minimum requirements of § 994(h), so long as the resulting guidelines do not conflict with any ‘specific directives of Congress’” (quoting *United States v. LaBonte*, 520 U.S. 751, 757 (1997))). The district court faithfully applied § 3582(c) in a manner consistent with Guideline § 1B1.10, which in turn is consistent with other statutory objectives.

B. Guideline § 1B1.10(b)(2)(A) is Constitutional.

Defendant contends that § 1B1.10 violates the Equal Protection Clause. It does not; this Court has already identified valid and rational bases for the limitations within § 1B1.10.

i. Rational basis review applies to this case.

Absent a suspect class (which defendant does not raise) or the deprivation of a fundamental right (which he fails to establish),

defendant's Equal Protection challenge is subject to a rational basis test, the lowest level of scrutiny applicable to Equal Protection challenges. *United States v. Dumas*, 64 F.3d 1427, 1430-31 (9th Cir. 1995); *United States v. Navarro*, 800 F.3d 1104, 1113 (9th Cir. 2015); *see also United States v. Johnson*, 626 F.3d 1085, 1088 (9th Cir. 2010) ("We apply the 'rational basis standard of review to equal protection challenges to the Sentencing Guidelines based on a comparison of allegedly disparate sentences.'" (citation omitted)).

Defendants have no constitutional right to sentence reductions to reflect subsequent guidelines amendments, let alone to reductions below their amended guidelines ranges. *See Dillon*, 560 U.S. at 827-28 (explaining that § 3582(c)(2) is a "narrow exception to the rule of finality" and sentencing modification proceedings under this statute "are not constitutionally compelled"); *see also Peck v. Thomas*, 697 F.3d 767, 774 (9th Cir. 2012) (observing that inmates have no liberty interest in sentence reductions under RDAP).

This Court has employed a rational basis review in rejecting both a Due Process and Equal Protection challenge to the Sentencing Commission's decision to delay Amendment 782's effective date.

Navarro, 800 F.3d at 1113-14. In doing so, it declined to use heightened scrutiny. *Id.* The same test applies here.

**ii. Section 1B1.10's distinction between
variances and substantial assistance
departures is rational.**

The Commission had a rational basis for limiting a reduction to the low-end of the amended guideline range, excluding departures and variances, and excepting from the exclusion defendants who received variances for substantial assistance. While defendant identifies hypothetical circumstances in which the guideline scheme yields seemingly irrational results, his argument fails under the correct legal test. Instead of imagining unfair scenarios, defendant bears the burden to “negative every conceivable basis which might support” the challenged rule. *United States v. Heller*, 509 U.S. 312, 320 (1993) (citation and internal quotation marks omitted). “[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity,” *id.* at 319, and must be upheld so long as its different treatment of defendant is “rationally related to a legitimate state interest.” *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Thus, if this Court could envision a rational,

fair basis, the rule survives rational basis review.

A classification is rationally related to a legitimate interest “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). General sentencing disparity survives rational basis review. *Dumas*, 64 F.3d at 1431. Moreover, judicial restraint is required because rational basis review “does not provide ‘a license for courts to judge the wisdom, fairness, or logic of legislative choices.’” *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013) (quoting *Beach Commc’ns, Inc.*, 508 U.S. at 313). Generalizations are accepted, even where there is an imperfect fit between ends and means, and “[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.” *Navarro*, 800 F.3d at 1114 (citation and internal quotation marks omitted).

In a similar context, the Supreme Court rejected an Equal Protection challenge to sentencing rules dealing with LSD, holding: “[t]hat distributors of varying degrees of culpability might be subject to the same sentence does not mean that the penalty system for LSD

distribution is unconstitutional.” *Chapman v. United States*, 500 U.S. 453, 467 (1991); *see also United States v. Chovan*, 735 F.3d 1127, 1132-33 (9th Cir. 2013) (recognizing that disparate treatment of some offenders did not render a statute vulnerable under the Equal Protection Clause). The same principles apply here.

In fact, in *Davis* and *Tercero* this Court articulated a rational basis for the Sentencing Commission’s policy limiting reductions to the amended guideline range, absent non-substantial assistance departures. Specifically, this Court noted that the Commission sought to “promote uniformity” and to “avoid undue complexity and litigation.” *Davis*, 739 F.3d at 1225. In addition, the Commission “was also 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 that the FSA sought to correct.” *Id.* Although the Commission exercised its discretion broadly—it used a meat cleaver rather than a scalpel—the Commission viewed the result as one that “struck the appropriate balance.” *Id.*

Given the foregoing considerations, this Court held that the Sentencing Commission did not exceed its discretionary authority in making this policy judgment. *Id.*¹ Likewise, in *Tercero* this Court noted that the previous version of § 1B1.10(b)(2)(B) was revised, “[b]ecause this rule proved difficult to administer and prompted litigation.” 734 F.3d at 981. The Third Circuit also found these rationales sufficient in *United States v. Deamues*, 553 Fed. App’x. 258, 261 (3d Cir. 2014), and noted that the Commission’s rule plausibly serves a valid purpose by offering an additional reward for cooperators that, in turn could serve as an incentive to future defendants. Thus, this Court and the Third Circuit have identified several rational bases for amended guideline § 1B1.10 and the distinction it drew between variances and substantial assistance departures.

Moreover, the rational bases this Court and the Third Circuit identified also serve to rebut defendant’s speculative hypothetical scenarios. If defendant A originally received a significant guideline variance because a judge believed that the drug guidelines were too

¹ Defendant claims that public hearing testimony “established that defendants were not receiving windfalls under the prior version of § 1B1.10.” Appellant’s Br. at 38. The government disputes that anything concrete was “established” by public hearing testimony.

harsh, while defendant B received a guideline sentence from a judge who viewed the drug guidelines as generally appropriate, it makes sense to limit the retroactive reduction to defendant B because defendant A has already received the benefit the Commission sought to confer via the retroactive guideline reduction. Further, future defendant C might be more inclined to cooperate with the government upon learning that the Commission granted greater discretion to district judges to consider reductions for cooperators. Accordingly, because defendant cannot “negative every conceivable basis” supporting the Commission’s rule, his constitutional attacks fail. *Heller*, 509 U.S. at 320.

In addition, defendant attempts to distinguish his case by claiming that he received a concurrent sentence adjustment. Appellant’s Br. 9, 16. Section 1B1.10(b)(2)(A), however, bars non-substantial assistance defendants from receiving a sentence below the low-end of the amended guideline range regardless of the reason for the variance or departure. At bottom, defendant challenges § 1B1.10’s limitation on variances, yet the legal support for § 1B1.10 is the same, regardless of the motivation for the variance.

In conclusion, instead of asking whether a statute—or in this case a guideline amendment—is the best answer, or whether a defendant has a better solution, so long as there is a “plausible” basis for the rule, the court’s inquiry “is at an end.” *Romero-Ochoa v. Holder*, 712 F.3d at 1331 (quoting *U.S. R.R. Ret. Bd. V. Fritz*, 449 U.S. 166, 179 (1980)). This Court already *has* identified a rational basis for the Sentencing Commission’s rule in *Davis* and *Tercero*. The guideline is constitutional.

C. Defendant’s original sentence was reduced by a variance, not a concurrency finding, and thus, his remaining arguments are factually misplaced.

Defendant’s remaining arguments are premised upon his claim that his original 4-month variance was actually a “concurrent” sentence that must be respected to satisfy sentencing considerations under § 3553(a) and § 3584. Because his factual premise is wrong and not supported by the record, his claims should fail for this alternative reason as well.

The district court’s sentencing Statement of Reasons, Part VI(C), justified defendant’s below-guideline sentence citing 18 U.S.C. § 3553(a) factors. SER 13; *see also* SER 14 (“The court imposed a sentence below

the advisory range pursuant to 18 USC § 3553(a) factors noted by the parties in their sentencing submissions.”). This is consistent with the judge’s oral pronouncement at sentencing: “Now, just so I’m clear, you’re not asking for concurrent time because the time has run, you’re asking for me to drop four months in order to account for time that’s run; is that right?” ER 80; *see also*, ER 82 (“[Defense counsel] is asking that I do what’s often done, which is take into account by way of *reduction of time already served* essentially for the same criminal conduct. And so I’m going to do that in this case.” (emphasis added)).

In deciding defendant’s § 3582(c) motion, the district court reaffirmed that the 4-month reduction to defendant’s original sentence was a downward variance rather than a concurrently imposed sentence, and acknowledged that it “lacked any authority to order a concurrent sentence.” ER 3. The court continued, “Due to this lack of authority, the best explanation for the additional 4-month reduction Defendant received is that it was a downward variance granted to achieve the functional result of a concurrent sentence.” ER 3.

The Statement of Reasons, the district court’s statements at sentencing and the written opinion denying defendant’s motion for a

sentence reduction all demonstrate that defendant's 4-month reduction was a variance, and thus, it is not a valid basis to further reduce his sentence under § 3582(c). Furthermore, the district court could not have imposed a "concurrent" sentence even if it had wanted to because defendant's prior state sentence was fully discharged by the time he was sentenced federally.

Section 3584 of Title 18 provides: "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." 18 U.S.C. § 3584(a) (emphasis added). There is no similar provision allowing a sentence to run concurrently to a discharged sentence.

The Guidelines also fail to provide any legal support for defendant's federal sentence to run concurrent with his discharged state sentence. Section 5G1.3 authorizes an adjustment to effectuate a concurrent sentence, but applies only to undischarged sentences; the Application Notes confirm this. *See* Application Notes 2(C)(iii) and 4(E)

(referring to an adjustment or departure for an undischarged term of imprisonment).

Section 5K2.23 addresses discharged sentences, but authorizes a departure to effectuate a concurrent sentence only if the other offense is relevant conduct for the instant case. It specifically limits downward departure to cases in which, “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.”

U.S.S.G. § 5K2.23. Because defendant’s violation of his post-prison supervision was not relevant conduct for the federal offense and it did not increase the offense level for the instant case, he could not have satisfied § 5K2.23 either. (SER 5, PSR at ¶¶ 26-35).

There is also no authority to support defendant’s contention that a sentence may run concurrently to a discharged sentence. In fact, this Court held the opposite when it observed: “If a defendant has been released from state prison after having served the term imposed, no term of imprisonment remains with which the federal sentence can ‘run concurrently.’” *United States v. Turnipseed*, 159 F.3d 383, 387 (9th Cir. 1998). The district court faithfully applied this holding when it

concluded, “It defies the very definition of the word ‘concurrent’ to say that a sentence will be run contemporaneously or simultaneously to a sentence that has already been completed. It is simply not possible.” ER 4-5.

Other circuits are in accord. *See, e.g., United States v. Lucas*, 745 F.3d 626, 629 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 150 (2014) (noting that § 3584 does not authorize the district court to direct that a federal sentence run concurrent to a previously served, completed sentence for related crimes); *United States v. Cruz*, 595 F.3d 744, 745 (7th Cir. 2010) (construing defendant’s request for concurrency as one for a “reduction on account of a sentence previously served”); *United States v. Fay*, 547 F.3d 1231, 1236 (10th Cir. 2008) (holding that district courts have no authority to impose a sentence to be served concurrently with a discharged sentence); *Prescod, Jr. v. Schuylkill*, No. 14-3701, 2015 WL 6796787, at *3 (3d Cir. Nov. 6, 2015) (same); *United States v. Markley*, 607 F. App’x 476, 477-78 (6th Cir. 2015) (same).

Defendant tries to circumvent these cases by arguing that *United States v. Setser*, 132 S. Ct. 1463, 1470 (2012), expanded courts’ common law authority to impose concurrent or consecutive sentences past the

boundaries prescribed by 18 U.S.C. § 3584 and the Sentencing Guidelines. Defendant's interpretation of *Setser* sweeps too broadly; that case held only that federal judges have discretion to order that federal sentences run consecutively to an "anticipated state sentence." 132 S. Ct. at 1473. The Court does not hold that district courts may run federal sentences concurrent to fully discharged state sentences, and nothing in *Setser* should be construed to overrule this Court's holding in *Turnipseed* or the other concurring circuit court opinions.

Defendant fails to cite a single case to support his claim that a court may lawfully impose a sentence that runs concurrently with a fully discharged prior sentence. His reliance upon *United States v. Drake*, 49 F.3d 1438 (9th Cir. 1995) is inapt because that ruling merely recognized that a court could impose a sentence below a statutory minimum to achieve concurrency with a related and undischarged state sentence. *Id.* at 1439-41. Similarly, the district court decision in *United States v. Malloy*, 845 F. Supp. 2d. 475 (N.D.N.Y. 2012), is also factually distinguishable because the concurrent sentence was for relevant conduct which had increased the defendant's criminal history

score, and the concurrent sentence was not clearly discharged. *Id.* at 484.

There is no basis under statutes, the Sentencing Guidelines, or common law, to render the four-month reduction defendant received a concurrent sentence. It was a variance, and the district court correctly held that defendant was not eligible for a further reduction below the low-end of his retroactively amended guideline range.

CONCLUSION

Based on the foregoing, the district court's order reducing defendant's sentence to 70 months should be affirmed.

Dated this 28th day of December 2015.

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

/s/ Kelly A. Zusman
KELLY A. ZUSMAN

/s/ Jeffrey S. Sweet
JEFFREY S. SWEET
Assistant United States Attorneys

STATEMENT OF RELATED CASES

Pursuant to 9th Cir. R. 28-2.6, the United States represents that the following District of Oregon cases should be deemed related as they contain a closely related issue:

- 1) U.S. v. Efigenio Aispuro-Aispuro; Case No. 15-30310
- 2) U.S. v. Diego Bermudez-Ortiz; Case No. 15-30353
- 3) U.S. v. Eduardo Bocanegra-Mosqueda; Case No. 15-30383
- 4) U.S. v. Roberto Cervantes-Esteva; Case No. 15-30391
- 5) U.S. v. Carlos Garcia-Uribe; Case No. 15-30306
- 6) U.S. v. Jose Garcia-Zambrano; Case No. 15-30351
- 7) U.S. v. Bartolo Favela Gonzales; Case No. 15-30347
- 8) U.S. v. Jose Carranza Gonzalez; Case No. 15-30377
- 9) U.S. v. Aleksander Gorbatenko; Case No. 15-30385
- 10) U.S. v. Bernardo Contreras Guzman; Case No. 15-30375
- 11) U.S. v. Jeffrey Heckman; Case No. 15-30294
- 12) U.S. v. Jose Luis Hernandez-Martinez; Case No. 15-30309
- 13) U.S. v. Edwin Magana-Solis; Case No. 15-30352
- 14) U.S. v. William Mahan; Case No. 15-30365
- 15) U.S. v. Jesus Morales; Case No. 15-30376

- 16) U.S. v. Armando Padilla-Diaz; Case No. 15-30279
- 17) U.S. v. Luis Pulido-Aguilar; Case No. 15-30354
- 18) U.S. v. Alejandro Renteria-Santana; Case No. 15-30315

CERTIFICATE OF COMPLIANCE
Circuit Rule 32(a)(7)(C)

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that the government's answering brief is:

Proportionately spaced, has a typeface of 14 points in Century Schoolbook font, and contains 4,880 words.

s/ Jeffrey S. Sweet
JEFFREY S. SWEET
Assistant United States Attorney

STATUTORY ADDENDUM

Table of Contents

18 U.S.C. § 3582	2
18 U.S.C. § 3584	4
28 U.S.C. § 991	5
28 U.S.C. §§ 994(o) and (u).....	6
U.S.S.G. § 1B1.10	7
U.S.S.G. § 5G1.3	14
U.S.S.G. § 5K2.23	18

18 U.S.C. § 3582 - Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment.--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.--Notwithstanding the fact that a sentence to imprisonment can subsequently be--

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;
a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

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

(1) in any case--

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

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a

determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

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

(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.

(d) Inclusion of an order to limit criminal association of organized crime and drug offenders.--The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

18 U.S.C. § 3584 - 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.

28 U.S.C. § 991 -United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to--

(1) establish sentencing policies and practices for the Federal criminal justice system that--

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 994(o) and (u) - Duties of the Commission

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

...

(u) 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.

U.S.S.G. § 1B1.10 - 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 (c) 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 (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) 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 (c) 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 (c) 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) 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, and 750 (parts A and C only).

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.—Consistent with 18 U.S.C. 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. 3553(a) 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).

(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 section 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).

**U.S.S.G. § 5G1.3 - 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) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), 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) (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) case. 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).

U.S.S.G. § 5K2.23 - 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.

9th Circuit Case Number(s) **NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

CERTIFICATE OF SERVICE**When All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that 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 on (date) .

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.

Signature (use "s/" format)

CERTIFICATE OF SERVICE**When Not All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that 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 on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

No. 15-30229

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT BRITO,

Defendant-Appellant.

**Appeal from the United States District Court
for the District of Oregon
Portland Division**

REPLY BRIEF OF APPELLANT

**Stephen R. Sady
Chief Deputy Federal Public Defender
Elizabeth G. Daily
Research & Writing Attorney
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123**

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Introduction	1
A. Because A Variance Granted To Achieve The Functional Equivalent Of Concurrency In Fact Results In A Concurrent Sentence, The “Amended Guideline Range” Includes The Amount Of The Variance.	2
1. Courts Have Inherent Authority To Grant Concurrency For Time In Post-Offense Custody, Regardless Of Whether The Sentence Is Discharged Or Undischarged, And Regardless Of The Procedural Mechanism Required To Achieve Credit.	3
2. Case Law Holding That Courts Cannot Grant Concurrency When The Prior Sentence Is Discharged Conflict With The Reasoning Of <i>Setser</i> That Section 3584(a) Is Not An Exclusive Conferral Of Authority.	7
3. Under U.S.S.G. § 1B1.10, A Variance To Achieve Concurrency Is Counted As Part Of The Sentence For Purposes Of Determining Whether The Sentence Is Within The Amended Guideline Range.	10
B. Excluding Concurrency Variances From Sentence Reductions Would Institutionalize Unwarranted Disparity Based On The Sequence And Timing Of Prosecutions, Contrary To The Guidelines’ Authorizing Statute.	11
1. The Government’s Reliance On <i>Dillon</i> Is Misplaced Because The Decision Was Premised Upon Application Of A Retroactive Guideline Amendment That Left “All Other Application Decisions Unaffected.”	12
2. This Case Presents A Statutory Question Of First Impression.	13

3.	Limiting Concurrency Adjustments In Retroactive Sentence Reductions Would Violate 28 U.S.C. § 991(b)'s Directive By Institutionalizing Unwarranted Disparity.....	17
C.	If § 1B1.10(b)(2)(A) Makes Sentence Reductions Dependent On The Mechanism Used To Achieve Concurrency, Then It Violates Equal Protection By Irrationally Making A Sentence Reduction Dependent On The Timing And Sequence Of Dual Prosecutions.	19
D.	This Case Should Be Heard And Decided Separately From Cases The Government Contends Are Related.....	25
	Conclusion	26
	Certificate of Compliance	28
	Certificate of Service	29

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

<i>Booker v. United States</i> , 543 U.S. 220 (2005).....	5, 12, 21
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	19
<i>Dillon v. United States</i> , 560 U.S. 817 (2010).....	11, 12, 13, 18
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008).....	16
<i>Hagans v. Lavine</i> , 415 U.S. 528 (1974).....	15
<i>Heller v. Doe by Doe</i> , 509 U.S. 312 (1993).....	25
<i>Lazy Y Ranch Ltd. v. Behrens</i> , 546 F.3d 580 (9th Cir. 2008)	19, 20
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	18
<i>Prescod v. Schuylkill</i> , No. 14-3701, 2015 WL 6796787 (3d Cir. Nov. 6, 2015).....	9
<i>Setser v. United States</i> , 132 S. Ct. 1463 (2012).....	passim
<i>Stinson v. United States</i> , 508 U.S. 36 (1993).....	11
<i>United States v. Carty</i> , 520 F.3d 984 (9th Cir. 2008) (en banc)	22

<i>United States v. Cruz</i> , 595 F.3d 744 (7th Cir. 2010)	8, 9, 10, 23
<i>United States v. Davis</i> , 739 F.3d 1222 (9th Cir. 2014)	passim
<i>United States v. Deamues</i> , 553 F. App'x 258 (3d Cir. 2014)	20, 24
<i>United States v. Drake</i> , 49 F.3d 1438 (9th Cir. 1995)	1, 6, 10, 25
<i>United States v. Fay</i> , 547 F.3d 1231 (10th Cir. 2008)	9
<i>United States v. Joyce</i> , 357 F.3d 921 (9th Cir. 2004)	15
<i>United States v. LaBonte</i> , 520 U.S. 751 (1997)	11
<i>United States v. Lucas</i> , 745 F.3d 626 (2d Cir. 2014)	7, 8, 9, 10
<i>United States v. Markley</i> , 607 F. App'x 476 (6th Cir. 2015)	9
<i>United States v. Pedrioli</i> , 931 F.2d 31 (9th Cir. 1991)	5
<i>United States v. Sipai</i> , 623 F.3d 908 (9th Cir. 2010)	23
<i>United States v. Tercero</i> , 734 F.3d 979 (9th Cir. 2013)	13, 14, 15, 16, 20
<i>United States v. Turnipseed</i> , 159 F.3d 383 (9th Cir. 1998)	7

<i>United States v. Wills</i> , 881 F.2d 823 (9th Cir. 1989)	5
<i>United States v. Wilson</i> , 503 U.S. 329 (1992).....	22
<i>Washington State Grange v. Washington State Republican Party</i> , 552 U.S. 442 (2008).....	2
<i>Webster v. Fall</i> , 266 U.S. 507 (1925).....	15

FEDERAL STATUTORY AUTHORITIES

18 U.S.C. § 3553(a)	5, 18, 19, 22, 27
18 U.S.C. § 3582(c)	12
18 U.S.C. § 3584(a)	passim
18 U.S.C. § 3584(b)	4
18 U.S.C. § 3585(a)	4
18 U.S.C. § 3624(b)	4
28 U.S.C. § 991(b)	passim
28 U.S.C. § 994	16, 18

ADDITIONAL AUTHORITIES

U.S. Sentencing Guidelines Manual § 1B1.10	passim
U.S. Sentencing Guidelines Manual § 5G1.3	5, 8, 10
U.S. Sentencing Guidelines Manual § 5K1.1	24
U.S. Sentencing Guidelines Manual § 5K2.23	5

U.S. Sentencing Guidelines Manual, app. C (supp. 2014)	26
Black’s Law Dictionary, 1569 (10th ed. 2014)	7

Introduction

The threshold question in this case asks whether a district court's downward variance to account for pretrial custody on another charge is counted as part of the sentence for purposes of determining whether the sentence is within the "amended guideline range" under U.S.S.G. § 1B1.10. The government's response largely avoids that question by assuming that any variance results in a sentence below the guideline range. Resp. Br. at 1. The Court should reject such a superficial analysis. Controlling precedent establishes that, by subtracting pretrial custody on another charge, the sentencing judge is not reducing the overall sentence but implementing its broad power to impose concurrent sentences. *United States v. Drake*, 49 F.3d 1438, 1440-41 (9th Cir. 1995). The "amended guideline range" referenced in U.S.S.G. § 1B1.10 must incorporate reductions to achieve concurrency; if not, the Guidelines policy statement violates the statutory command that sentencing policies and practices must be formulated to avoid unwarranted sentencing disparities. Further, the disparate treatment of similarly situated defendants based on irrational factors would violate the requirement of equal protection under the law.

Unlike the structure of the government's answering brief, this reply first explains why the original variance effected a concurrent sentence that should be counted for purposes of determining whether the reduction is within the "amended

guideline range,” and then turns to the statutory conflict and constitutional arguments. That structure best serves the fundamental principle of judicial restraint, in which courts generally seek to resolve legal questions on the narrowest grounds. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008). Here, if the requested sentence is within the “amended guideline range” by including time served on a functionally concurrent sentence, the Court need not consider whether the policy statement conflicts with sentencing statutes or the Constitution. In addition, the fact that the variance was granted to achieve a functionally concurrent sentence is a special consideration that informs both the statutory and constitutional analyses. Although cases involving other types of variances and departures raise related and overlapping arguments, the concurrency issue should be addressed separately. The concurrency issue is only raised in one of the related cases joined by the Appellate Commissioner: *United States v. Mahan*, No. 15-30305.

A. Because A Variance Granted To Achieve The Functional Equivalent Of Concurrency In Fact Results In A Concurrent Sentence, The “Amended Guideline Range” Includes The Amount Of The Variance.

The determination of concurrency requires a functional analysis of the sentencing process, depending solely on the time of pretrial custody in relation to the federal offense, rather than on the status of the prior sentence or the mechanism

used to achieve the concurrent result. The government's argument to the contrary relies on an interpretation of 18 U.S.C. § 3584(a) that the Supreme Court expressly rejected in *Setser v. United States*, 132 S. Ct. 1463 (2012). Because subtracted time to achieve concurrency is part of the overall federal sentence, it is counted for purposes of determining whether the reduced sentence is within the "amended guideline range" for purposes of U.S.S.G. § 1B1.10.

1. Courts Have Inherent Authority To Grant Concurrency For Time In Post-Offense Custody, Regardless Of Whether The Sentence Is Discharged Or Undischarged, And Regardless Of The Procedural Mechanism Required To Achieve Credit.

The government's claim that U.S.S.G. § 1B1.10 prohibits a sentence reduction that includes the four-month presentence custody time depends on two premises. First, the district court "could not have imposed a 'concurrent' sentence even if it had wanted to because defendant's prior state sentence was fully discharged by the time he was sentenced federally." Resp. Br. at 23. Second, the sentence adjustment was a "variance," so it could not have been a concurrent sentence. Resp. Br. at 22. Both premises are false. Concurrency does not depend on whether the other sentence has been served, is being served, or is yet to be served. Sentencing judges have power to grant concurrency for all time in official custody after the offense, 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.

A federal sentence consists of 1) the period from the date the defendant is received in custody awaiting transportation to, or arrives voluntarily at, the official detention facility (18 U.S.C. § 3585(a)), 2) credit for pretrial custody “for any time in official custody” after the commission of the offense not counted against another sentence (18 U.S.C. § 3584(b)), and 3) good time credits (18 U.S.C. § 3624(b)). Thus, any time in official custody after commission of the offense can be included as part of the sentence and is within the sentencing judge’s authority to run time concurrently toward expiration of the federal sentence.

Statutory and guideline provisions provide different procedural mechanisms to achieve concurrency, depending upon the circumstances. *See* 18 U.S.C. § 3584(a) (providing for orders of concurrency when “multiple terms of imprisonment are imposed at the same time” or when a term of imprisonment “is imposed on a defendant who is already subject to an undischarged term of imprisonment”); U.S.S.G. § 5G1.3(b) (providing for adjustments to achieve concurrency on an undischarged sentence for relevant conduct); U.S.S.G. § 5K2.23 (providing for departures to achieve concurrency on discharged terms of imprisonment); 18 U.S.C. § 3553(a) (providing for variances to achieve a reasonable sentence). But none of

these provisions cabin sentencing courts' authority. *Setser* expressly held that 18 U.S.C. § 3584(a) "leave[s] room for the exercise of judicial discretion in the situations not covered" because it does not contain "an implied 'only.'" 132 S. Ct. at 1470.

Citing U.S.S.G. § 5K2.23, the government asserts that judges can only effectuate concurrency with discharged sentences when the sentence is imposed for relevant conduct. Resp. Br. at 24. On the contrary, the Guidelines system has not been mandatory since the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220, 244 (2005) (opinion of Justice Breyer construing the guidelines to be advisory). Even prior to that, *United States v. Wills*, 881 F.2d 823, 826 (9th Cir. 1989) and *United States v. Pedrioli*, 931 F.2d 31, 32 (9th Cir. 1991), recognized that concurrency is a judicial prerogative apart from the Guidelines. These cases contradict the government's argument that the sentencing judge could not have imposed a concurrent sentence without express authority by guideline or statute. Resp. Br. at 23-24. The Court had complete discretion to effect a concurrent sentence by granting a variance.

The government attempts to create a false dichotomy in which a variance cannot also be a concurrent sentence. Resp. Br. at 21-22 (arguing that the four-month reduction "was a downward variance rather than a concurrently imposed sentence").

Not so. 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. The government quotes the sentencing judge's words that make its position untenable: Mr. Brito received the four-month variance "to achieve the functional equivalent of a concurrent sentence." Resp. Br. at 22.

Unlike any other type of variance, a variance to achieve concurrency is not intended to reduce the punishment for the federal sentence. Here, Mr. Brito was originally serving 80 months for his federal crime. The judicial decision to credit time served on a post-arrest sentence was implemented by a judgment imposing a 76-month term of imprisonment. As this Court held in *Drake*, time credited to achieve concurrency – a functional analysis – determines the length of sentence for statutory purposes. The federal 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."). There is nothing in the sentencing statutes or the advisory guidelines that limits or prevents a sentencing judge from running sentences fully or partially concurrently with state pretrial custody, whether or not the state sentence was discharged at the time of sentencing.

2. *Case Law Holding That Courts Cannot Grant Concurrency When The Prior Sentence Is Discharged Conflict With The Reasoning Of Setser That Section 3584(a) Is Not An Exclusive Conferral Of Authority.*

The government next relies on case law for its contention that the sentencing judge did not have concurrent sentencing authority. However, the main out-of-circuit case squarely conflicts with the reasoning of *Setser*. Resp. Br. at 25 (citing *United States v. Lucas*, 745 F.3d 626, 629 (2d Cir. 2014)).¹ In *Lucas*, the court held that the district court did not have authority to credit time served on a completed sentence for relevant conduct against a later federal mandatory minimum sentence. 745 F.3d at 629. The court read the specific reference to “undischarged” in § 3584(a) as meaning that reductions were unavailable for “discharged” sentences. *Lucas*, 745 F.3d at 630 (“From the section’s use of the modifier ‘undischarged,’ it may reasonably be inferred that Congress did not intend to allow the court to make a new prison term run concurrently with a prison term that has already been complete.”).

This reasoning was rejected in *Setser*, where the Court held that § 3584(a) did *not* exclusively define the power of the sentencing court to achieve concurrency:

¹ The Opening Brief distinguished *United States v. Turnipseed*, 159 F.3d 383, 387 (9th Cir. 1998), on the facts and law. Op. Br. at 17-19. Further, at the time *Turnipseed* was decided, the Guidelines were mandatory and neither § 5K2.23 nor its predecessor as Application Note 7 to § 5G1.3 existed.

The Latin maxim on which Setser relies—*expressio unius est exclusio alterius*—might have application here if the provision in question were a conferral of authority on district courts. Giving sentencing authority in only specified circumstances could be said to imply that it is withheld in other circumstances. *Section 3584, however, is framed not as a conferral of authority but as a limitation of authority that already exists* (and a specification of what will be assumed when the exercise of that authority is ambiguous). It reads not “District courts shall have authority to impose multiple terms of imprisonment on a defendant at the same time, etc.” but rather “If multiple terms of imprisonment are imposed on a defendant at the same time, [etc.]”—quite clearly assuming that such authority already exists. *The mere acknowledgment of the existence of certain pre-existing authority* (and regulation of that authority) *in no way implies a repeal of other pre-existing authority*. And that is especially true when there is an obvious reason for selecting the instances of pre-existing authority that are addressed—to wit, that they are the examples of sentencing discretion most frequently encountered.

132 S. Ct. at 1469 (emphases added). *Lucas*’s reasoning and interpretation of § 3584(a) squarely conflict with *Setser*. And the *Setser* reasoning also protects against irrational results. As the Second Circuit acknowledged, if the state sentences overlapped by even a day, 18 U.S.C. § 3584(a) and U.S.S.G. § 5G1.3 would allow a sentence below the mandatory minimum to achieve full concurrency; but if the state sentences expired the day before the federal sentencing, the sentences would run consecutively by operation of law, regardless of the sentencing judge’s desire for concurrency. *Lucas*, 745 F.3d at 628, 630.

The same, rejected interpretation of § 3584(a) as an exclusive conferral of authority underlies the other opinion cited by the government, *United States v. Cruz*,

595 F.3d 744 (7th Cir. 2010).² Resp. Br. at 25. The court in *Cruz* regretted that, because of its statutory interpretation, it could not apply a method that “eliminated an arbitrary feature of concurrent sentencing.” *Id.* at 747.

The government’s reliance on the unpublished opinion in *Prescod v. Schuylkill*, No. 14-3701, 2015 WL 6796787 (3d Cir. Nov. 6, 2015), is especially off point. Resp. Br. at 25. There, the pro se prisoner sought to require the Bureau of Prisons, not the sentencing judge, to provide nunc pro tunc designation as a matter of right. In rejecting the claim, the court noted that the prisoner was sentenced before the Guidelines amendment that purported to permit departures for service of discharged terms of imprisonment. *Id.* at *3. At that time, the Guidelines were mandatory. The court also relied without analysis on *Lucas*, despite its reasoning having been rejected by *Setser*.³

Following *Setser*’s clarification that § 3584(a) does not limit concurrency authority in the situations not described in the statute, this Court need not

² See also *United States v. Fay*, 547 F.3d 1231, 1236-37 (10th Cir. 2008) (treating § 3584(a) as a conferral, not a limitation, on concurrency authority).

³ The other unpublished disposition, *United States v. Markley*, 607 F. App’x 476 (6th Cir. 2015), is also unpersuasive because it likewise relied without analysis on a pre-*Setser* case to hold that there was no right to concurrent sentence on a supervised release violation.

countenance the arbitrary denial of concurrency as the court felt constrained to do in *Cruz*. And of course the present case, unlike both *Lucas* and *Cruz*, does not involve the issue of mandatory minimum sentencing.

3. *Under U.S.S.G. § 1B1.10, A Variance To Achieve Concurrency Is Counted As Part Of The Sentence For Purposes Of Determining Whether The Sentence Is Within The Amended Guideline Range.*

In sum, contrary to the government’s contention, a variance “to achieve the functional equivalent of a concurrent sentence,” in fact achieves a concurrent sentence. Under *Drake*, 49 F.3d at 1440-41, and as recognized in the Guidelines commentary to U.S.S.G. § 5G1.3, credit for pretrial custody is counted as part of the federal sentence. Those principles make the analysis under U.S.S.G. § 1B1.10(b)(2)(A) simple – a variance that grants credit for post-offense time in official custody is part of the sentence for purposes of determining whether the sentence is within the “amended guideline range.” In this case, a reduction to 66 months would incorporate the four-month period in state custody to effect a 70-month within-guideline sentence. The district court erred in concluding that a reduction to 66 months was prohibited by U.S.S.G. § 1B1.10.

B. Excluding Concurrency Variances From Sentence Reductions Would Institutionalize Unwarranted Disparity Based On The Sequence And Timing Of Prosecutions, Contrary To The Guidelines' Authorizing Statute.

Because the U.S.S.G. § 1B1.10 policy statement, as interpreted by the district court, institutionalizes unwarranted disparity, while nullifying warranted disparity, it is trumped and rendered invalid by conflicting sentencing statutes. *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.").

The government response misunderstands the significance of *Dillon v. United States*, 560 U.S. 817 (2010), which prohibits sentence reduction proceedings from altering the original sentencing decisions. *Compare* Opening Brief at 31, *with* Resp. Br. at 4, 7, 11. Further, the government places undue reliance on prior decisions of this Court, which never previously ruled on the statutory or constitutional questions of first impression raised here. 28 U.S.C. § 991(b) directs that all guideline "sentencing policies and practices" must avoid unwarranted disparity and permit flexibility to consider individualized circumstances. If construed to negate

concurrency adjustments, § 1B1.10 does not meet that test because it is a rule that necessarily causes disparity.

1. The Government's Reliance On Dillon Is Misplaced Because The Decision Was Premised Upon Application Of A Retroactive Guideline Amendment That Left "All Other Application Decisions Unaffected."

The government argues that the § 1B1.10(b)(2)(A) limitation on sentence reductions is justified under *Dillon*, based on the principle that “sentence modification proceedings under 18 U.S.C. § 3582(c) are a limited and narrow exception to the general rule that a sentence is final once it is imposed.” Resp. Br. at 4. The defense agrees with this articulation of the principle from *Dillon*, but disagrees with the government’s conclusion that *Dillon* permits interference with final sentencing decisions on concurrency that are unrelated to the guideline amendment.

In *Dillon*, the Court denied a defendant’s request that, in applying the 2008 crack guideline reduction, the court also consider granting variances that were previously unavailable because he had been sentenced before *Booker*. 560 U.S. at 831. The Court held that the district court could not reconsider aspects of the original sentence other than the guideline reduction because “§ 3582(c)(2) 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, in which courts may only substitute the new guideline for the old one and must “leave all other guideline application decisions unaffected.” 560 U.S. at 830-31.

The *Dillon* Court’s reasoning does not establish that the Sentencing Commission has carte blanche to limit sentence reduction proceedings in ways that revisit aspects of the original sentence unrelated to the guideline amendment. Instead, the principle of finality set out in *Dillon* was conditioned on implementing guideline amendments in a manner that leaves “all other application decisions unaffected.” Foreclosing concurrency variances is inconsistent with *Dillon* because, in effect, it creates a resentencing at which the original concurrency decision is nullified and the concurrent sentence is changed to a consecutive or partially consecutive sentence.

2. *This Case Presents A Statutory Question Of First Impression.*

The government argues that this Court’s precedent has already rejected the statutory conflict argument, placing primary reliance on *United States v. Tercero*, 734 F.3d 979 (9th Cir. 2013), and *United States v. Davis*, 739 F.3d 1222 (9th Cir. 2014). Resp. Br. at 10-12. Neither case is on point.

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 980-81. 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 noted that the defendant did not identify specific statutory text with which § 1B1.10 conflicted, but instead only contended "that § 1B1.10 contradicts Congress's general intent in passing the [Fair Sentencing Act.]" 734 F.3d at 982. Similarly, the defendant argued that the new version of § 1B1.10(b)(2) conflicts with the "purpose of the guidelines," which she identified as bringing 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." This Court rejected that argument without discussing the statutory

directive in 28 U.S.C. § 991(b). *Id.* The opinion in *Tercero* had nothing to do with concurrency, and neither the decision nor the briefs of the parties ever mentioned 28 U.S.C. § 991(b) or unwarranted disparity. 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, *Tercero* (Dec. 14, 2012), 2012 WL 6682049.

Tercero does not provide precedent regarding 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, “sub silentio” rulings on jurisdiction don’t bind the Court “when a subsequent case finally brings the jurisdictional issue before us.” *Hagans v. Lavine*, 415 U.S. 528, 535, n.5 (1974).

The opinion in *Davis* likewise fails to directly address the statutory validity of § 1B1.10 under 28 U.S.C. § 991(b). The defendant in *Davis* originally received a variance below the guideline range because of his difficult childhood and commitment to rehabilitation. 739 F.3d at 1223-24. The defendant argued that the amended version of U.S.S.G. § 1B1.10 violated 28 U.S.C. § 994(a)(2), which instructed the Commission to promulgate and distribute policy statements that “in

the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18[.]” This Court rejected that challenge because the administrative record established the “view of the Commission” that the amendment to § 1B1.10 would further the purposes of sentencing. 739 F.3d at 1225. The Court did expressly or implicitly approve of the Commission’s view, that is, its belief that § 1B1.10 would further the purposes of sentencing, let alone any specific purpose. It simply held that § 994(a)(2) gave the Commission authority to promulgate the policy. *Id.*

Unlike § 994(a)(2), § 991(b) does not give the Commission authority to promulgate any policy that the Commission subjectively believes will further sentencing purposes. Section 991(b) requires that all of the Commission’s policies and practices must objectively meet certain purposes: specifically, “avoiding unwarranted sentencing disparities” and “maintaining sufficient flexibility to permit individualized sentences[.]” Thus, *Davis* does not stand for the proposition that § 1B1.10 comports with § 991(b), and like *Tercero*, *Davis* never considered the concurrency question raised here.

This Court should address the statutory arguments about concurrency 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,” or whether the Commission acted within the authority of a different statute, 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 issues that were absent from *Tercero* and *Davis*.

3. *Limiting Concurrency Adjustments In Retroactive Sentence Reductions Would Violate 28 U.S.C. § 991(b)’s Directive By Institutionalizing Unwarranted Disparity.*

The government contends that § 991(b) “has no bearing on sentencing reductions governed by § 3582(c).” Resp. Br. at 13. The plain language of the statute applies to “sentencing policies and practices for the Federal criminal justice system.” 28 U.S.C. § 991(b)(1). The government does not explain why rules for applying sentence reductions are not either “sentencing policies” or “sentencing practices.” The government appears to argue that § 994(u) somehow trumps § 991(b). That provision 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 fact that 28 U.S.C. § 994(u) grants the Sentencing Commission authority to implement retroactive guideline amendments, just as other sections of 28 U.S.C. § 994 grant the Sentencing Commission authority to implement other functions, does not mean that those functions fall outside the umbrella of § 991(b). *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (statutory meaning depends on “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole”). Retroactive guideline amendments are not exempt from the general requirements for all sentencing policies and practices.

As described in Mr. Brito’s Opening Brief, the prohibition against including concurrency variances as part of the sentence does not avoid unwarranted disparities; it creates them. Op. Br. at 31-34. The original determination to grant credit for presentence custody took into account the total reasonable federal sentence in relation all of the § 3553(a) factors, including the guideline range. By contrast, prohibiting concurrency variances negates that determination and requires the federal sentence to be served consecutively to the earlier sentence. The creation of disparity is not an incidental result in some hypothetical circumstances, it is the rule’s necessary consequence.

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 related to concurrency made by the original sentencing court. By doing so, in violation of § 991(b) and § 3553(a), the rule injects disparity and unfairness into the sentence.

C. If § 1B1.10(b)(2)(A) Makes Sentence Reductions Dependent On The Mechanism Used To Achieve Concurrency, Then It Violates Equal Protection By Irrationally Making A Sentence Reduction Dependent On The Timing And Sequence Of Dual Prosecutions.

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)). 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.” . . . 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 *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 state did not use administrative costs as a reason to deny leases to other ranchers, specifically, those who were not associated with conservation groups. Although the stated reason for the denial was rational, this Court approved inquiry into whether the reason was actually true – that is, whether leases to Lazy Y carried higher administrative costs than leases that had been granted to other ranches. *Lazy Y Ranch*, 546 F.3d at 591.

The government puts forth four potential rationales for the rule in § 1B1.10, which it implies have already been accepted by this Court and the Third Circuit Court of Appeals (in an unpublished opinion): (1) promoting “uniformity,” (2) avoiding “undue complexity and litigation,” (3) preventing “windfalls,” and (4) incentivizing cooperation. Resp. Br. at 18-19 (citing *Davis*, 739 F.3d at 1225, *Tercero*, 734 F.3d at 981, and *United States v. Deamues*, 553 F. App’x 258, 261 (3d Cir. 2014)). This Court has not previously approved those rationales under the Equal Protection Clause, and it should not do so now.

As noted above, this Court in *Davis* and *Tercero* merely identified the Sentencing Commission’s reasons for the limitation in § 1B1.10 and never conducted an analysis to determine whether those reasons provided a rational basis for the rule. *See Davis*, 739 F.3d at 1225 (listing the reasons identified by the

Commission for amending § 1B1.10 to determine whether the rule furthered the purposes of sentencing “in the view of the Commission”); *Tercero*, 734 F.3d at 981 (making passing reference to the Commission’s stated reason for amending § 1B1.10). This Court has never given those explanations its imprimatur.

The Court should not do so now because none of the asserted goals rationally justifies the blanket prohibition against counting any variance or departure – especially adjustments used to achieve concurrency by crediting time in presentence custody. First, “promoting uniformity” at the expense of the sentencing judge’s original sentencing decisions is not a legitimate goal in the circumscribed context of sentence modification proceedings. 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). Although the amendment to § 1B1.10 certainly promotes uniformity by compressing sentences to be closer to the guideline range, in the post-*Booker* age when the advisory guidelines are only one factor the court must consider under § 3553(a), it is not a legitimate goal to use sentence modifications 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 only one of the § 3553(a) factors and are entitled to no more weight than any of the others. *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc).

Thus “promoting uniformity” 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’s sentence should be adjusted to account for concurrent time served in pretrial custody credited against another sentence, and that another defendant should not receive similar consideration, the Sentencing Commission cannot legitimately seek to promote uniformity by making only the defendant with the higher sentence eligible for a reduction. Indeed, the rule decreases uniformity in the concurrency context because it makes the reduction dependent on irrelevant factors including how quickly the federal offense was resolved, the length of the prior sentence, and how much of the prior sentence had been served before federal sentencing. *See 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.”). As Seventh Circuit recognized, if authority to grant a concurrent sentence depends on when the state sentence is

discharged, then defendants will serve substantially different periods of actual incarceration based on the timing of their custody and prosecutions. *Cruz*, 555 F.3d at 746-47.

There are two problems with the goal of avoiding litigation and complexity. First, that goal is so broad that virtually any action taken by the Commission could be argued to meet it. The Commission could, for example, allow an across-the board 12-month sentence reduction to defendants whose last names begin with the letter “A.” That classification would make it clear who qualifies for a reduction and how to implement the reduction, but it would not be rational. Second, there was not actually excessive litigation or undue complexity under the previous version of §1B1.10(b)(2). By 2011, courts had already created a well-established and simple rule for determining who was eligible for a sentence reduction. *See United States v. Sipai*, 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.”); Op. Br. at 27-28 (citing cases). The 2011 amendment did not make the rule less complex or avoid further litigation.

This leads to the “windfall” concern, 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. This is the single

hypothetical scenario that the government has put forth in which the rule would lead to a fair result. Resp. Br. at 20. But the Sentencing Commission had no evidence that “windfalls” were actually a problem under previous versions of §1B1.10(b)(2), which encouraged judges to deny a reduction as a matter of discretion in those circumstances. Indeed, the evidence was that no stakeholders in the criminal justice system considered them to be. *See* Op. Br. at 28-29, 38-39. Moreover, the windfall concern is entirely inapplicable when the reason for the variance is to effect a concurrent sentence and the purpose of the amendment is to ameliorate the harshness of the drug quantity table.

Last, the rule also does not promote the rationale asserted by the Third Circuit in its unpublished disposition in *Deamues*. 553 F. App’x at 261. Although permitting reductions for cooperators may incentivize cooperation, the same logic does not require preclusion of other reductions. For example, U.S.S.G. § 5K1.1 provides an incentive for cooperation even though it is not the *only* basis for courts to impose below-guideline sentence.

The present situation, then, is that the Sentencing Commission stated certain problems that its guideline amendment would remedy – avoiding complexity, avoiding litigation, and 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 so 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 v. Doe by Doe*, 509 U.S. 312, 321 (1993). Here the agency action is not rooted in reality, the connection between the action and the goal is insufficient, and the result is arbitrary.

D. This Case Should Be Heard And Decided Separately From Cases The Government Contends Are Related.

The cases identified by the government as related cases involve sentence reduction motions where the original sentence included a variance or departure below the amended guideline range, but only one other case – *United States v. Mahan*, No. 15-30305 – involves a variance granted to achieve a concurrent sentence. While the issues in all of the cases overlap, this case and *Mahan* should be considered and decided separately from the remaining cases because there are additional grounds for relief where the purpose of the variance is to achieve concurrency. First, the reasoning of *Drake* and the Guidelines commentary establish that U.S.S.G. § 1B1.10(b)(2)(A) should be construed so that variances to achieve concurrency are included in determining whether the reduced sentence is within the

amended guideline range. Relatedly, the arbitrariness and disparity caused by prohibiting concurrency adjustments from retroactive guideline amendment reductions – when those adjustments are considered to be part of the overall federal sentence – is even more pronounced than in the case of other variances and departures.

Conclusion

Retroactive guideline amendments like Amendment 782 have an ameliorative purpose. The Sentencing Commission promulgated Amendment 782 to reflect a lessened emphasis on drug quantity in establishing offense culpability, and the amendment was aimed in part at alleviating the “significant overcapacity” of the Bureau of Prisons. U.S.S.G. Manual, app. C at 73 (supp. 2014). The offense level reductions were intended to “permit 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, thereby enhancing public safety.” *Id.* With increasing recognition of the broad detrimental impact of mass incarceration, the policy statement for implementing retroactive amendments should be construed so as not to transform previously concurrent sentences into consecutive sentences.

For the foregoing reasons and those stated in the Opening Brief, the Court should reverse the decision of the District Court asserting lack of jurisdiction and remand for the exercise of discretion to reduce the sentence by an additional four months pursuant to 18 U.S.C. §§ 3553(a) and 3582(c).

Respectfully submitted this 24th 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. 15-30229
v.	)	
	)	
GILBERT BRITO,	)	
	)	
Defendant-Appellant.	)	

CERTIFICATE OF COMPLIANCE

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

1. 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,957 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 24th day of March, 2016.

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

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2016, I electronically filed the foregoing Reply 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