

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

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**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**v.**

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

**Defendants-Appellants.**

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

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**APPELLANTS' OPENING BRIEF**

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## STATEMENT OF JURISDICTION

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

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

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

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

## STATEMENT OF ISSUES

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

1. Is the limitation in U.S.S.G. §1B1.10 (2011), prohibiting retroactive reductions because the defendants previously received variances or departures, in irreconcilable conflict with the statutory directive in 28 U.S.C. §991(b)(1)(B) that all sentencing policies and practices must avoid unwarranted sentencing disparity while permitting sufficient flexibility to make individualized sentencing decisions?
2. Does the application of the current version of U.S.S.G. §1B1.10(b)(2)(A) to nullify the previously-awarded departures and variances violate the Equal Protection Clause by prohibiting a reduction for people who have been deemed to be deserving of lower, below-guideline sentences, but permitting a reduction for people who have been deemed to require longer, within-guideline sentences?
3. As to defendants Padilla-Diaz and Heckman, who pled guilty under the pre-2011 version of U.S.S.G. §1B1.10(b)(2)(A), does the due process-based retroactivity doctrine require the new version of §1B1.10(b)(2) to apply only prospectively?

## **STATEMENT OF THE CASE**

### **Nature of the Case**

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

### **Relevant Facts And Procedural History**

#### **1. Armando Padilla-Diaz**

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

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

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

**9. 3553(a) Adjustment:** The USAO agrees to recommend two variances pursuant to 18 U.S.C. §3553(a).

**A. Forfeiture of Right to Challenge Wiretaps, Statements and Seizure of Physical Evidence:** In return for the defendant agreeing not to file any pretrial motions challenging the wiretaps, his statements and the seizure of physical evidence in this case the government agrees to recommend that the Court grant the defendant an additional two-level reduction in his offense level. The government recognizes that the defendant's agreement to forgo filing pretrial motions is an added benefit beyond the standard acceptance of responsibility. Absent qualification for "safety valve" relief, such a recommendation shall not result in a sentence below any otherwise applicable mandatory minimum sentence.

**B. Forfeiture of Right to Seek a Lesser Sentence:** In return for the defendant agreeing not to seek a lesser sentence, the government agrees to recommend that the Court grant the defendant an additional **one-level reduction** in his offense level. Absent qualification for "safety valve" relief, such a recommendation shall not result in a sentence below any otherwise applicable mandatory minimum sentence.

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

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

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

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

## **2. Jeffrey Heckman**

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

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

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

As pointed out by the defense letter, defendant's sales were made to the government informant on the representation that the substance was ecstasy (MDMA) when in fact it was not. Instead, defendant sold a street drug combination of the controlled substance BZP (Benzylpiperazine), and Methamphetamine and several other non-controlled substances. The substitution of BZP for MDMA is not unheard of on the illegal street drug market, with both sold as ecstasy. The amount of BZP was significantly more than that of methamphetamine, and the methamphetamine was a very low percentage of the overall drug combination.

#### **Government's Sentence Recommendation**

The Government finds the Defendant's letter advocating a sentence of 63 months persuasive. The Government joins with the defense and respectfully requests that the Court impose a sentence of 63 months, 3 years of post-prison supervision, a \$100 fee assessment and dismissal of all remaining counts.

ER-JH 86-87.

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

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

### **3. Bernardo Guzman and Jesus Morales**

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

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

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

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

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

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

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

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

#### **4. Sentence Reduction Motions**

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

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

## **Standard of Review**

The Court of Appeals reviews for abuse of discretion the district court's denial of a motion for reduction of sentence under 18 U.S.C. §3582(c). *United States v. Tercero*, 734 F.3d 979, 981 (9th Cir. 2013); *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010). However, in the present cases, the district courts based their denial of the sentence reductions on legal analysis only, and not on factual findings or the exercise of discretion. This Court reviews de novo questions of statutory and constitutional construction. *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012); *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc). A district court by definition abuses its discretion when it makes an error of law. *Koon v. United States*, 518 U.S. 81, 100 (1996) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)); *Tercero*, 734 F.3d at 981; *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009).

## **Custody/Bail Status/Release Date**

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

## **SUMMARY OF ARGUMENT**

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

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

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

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

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

## ARGUMENT

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

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

The Sentencing Commission is required by statute to “establish sentencing policies and practices for the Federal criminal justice system” that, among other things, (1) “assure the meeting of the purposes of sentencing as set forth in §3553(a)(2),” and (2) “provide certainty and fairness” in meeting the purposes of sentencing, including “avoiding unwarranted sentencing disparities” among defendants with similar records who commit similar offenses “while maintaining sufficient flexibility to permit individualized sentencing decisions.” 28 U.S.C. §991(b). The purposes of sentencing set out in §3553(a)(2) include the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

This overarching mandate in §991(b) to meet these goals “for the Federal criminal justice system” necessarily includes retroactive sentencing reduction proceedings under 28 U.S.C. §3582(c)(2), which are part of the Federal criminal justice system. Sentencing Guidelines that are inconsistent with the Sentencing Commission’s originating statute are invalid. *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (the Sentencing Commission’s broad discretion to formulate guidelines “must bow to the specific directives of Congress”). In *LaBonte*, the Supreme Court struck down the Sentencing Commission’s provision for determining the offense level for career offenders as inconsistent with the statutory directive of 28 U.S.C. §994(h) to provide for sentences “at or near” the “maximum term authorized.” *Id.* at 753. The Court was “unmoved” by the Commission’s stated justifications for departing from the statutory directive.

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

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

A retroactive sentence reduction under 18 U.S.C. §3582(c) is not a “plenary resentencing proceeding” requiring courts to reweigh the §3553(a) factors. *Tercero*, 734 F.3d at 983. In *Dillon v. United States*, the Court denied a defendant’s request that, in applying the 2008 crack guideline reduction, the court also consider variances that were previously unavailable because he had been sentenced before *United States v. Booker*, 543 U.S. 220 (2005). 560 U.S. 817 (2010). The Court held that the district court could not reconsider aspects of the sentence other than the guideline reduction because “§3582(c) does not authorize a sentencing or resentencing proceeding.” *Dillon*, 560 U.S. at 825. *Dillon* found no Sixth Amendment implications in a sentence reduction process under §3582(c) and §1B1.10(b)(2) because of the “circumscribed nature” of sentence modification proceedings, and the “fundamental differences” between a sentencing proceeding versus a sentence reduction proceeding applying a retroactive guideline. 560 U.S. at 830. The Court in *Dillon* noted that §1B1.10(b)(1) requires the court to substitute the new guideline for the old one and “leave all other guideline application decisions unaffected.” 560 U.S. at 831. Because *Dillon* involved a situation where the defendant could not have received variances in his original sentencing, the opinion did not expressly address the authority of the court when the defendant *did* receive departures or variances originally. However, the Court’s reasoning suggests that

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

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

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

U.S.S.G. §1B1.10(b)(2)(2011).

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

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<sup>2</sup> The history of amendments to §1B1.10 is set out at length at pages 42-44, below.

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

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

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

(5). A judge imposing an outside-guideline sentence must “consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Carty*, 520 F.3d at 991 (quoting *Gall*, 552 U.S. at 47). Thus, the defendant’s sentence must be reasonable in relation to the guideline range.

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

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

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

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

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

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

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

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

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

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

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

This Court should address the statutory argument in the first instance. “[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (footnotes omitted). Here, a discussion about whether §1B1.10 conflicts with some generalized “purpose of the guidelines” cannot substitute for, or

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

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

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

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

Irrational and arbitrary classifications violate the equal protection clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991); *United States v. Trimble*, 487 F.3d 752, 754 (9th Cir. 2007). Laws that distinguish between classes will be upheld if the distinction is rationally related to a legitimate state interest, but the state “may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985)). For example, and particularly relevant here, courts have recognized that equal protection considerations prohibit granting credit for presentence custody to more serious offenders while denying them to less serious ones. *Jonah R. v. Carmona*, 446 F.3d 1000, 1008 (9th Cir. 2006) (irrational to provide presentence credits to adults but not juveniles); *Myers v. United States*, 446 F.2d 232, 234 (9th Cir. 1971); *Dunn v. United States*, 376 F.2d 191 (4th Cir. 1967) (“Denial of credit ... where others guilty of crimes of the same or greater magnitude automatically receive credit, would entail an arbitrary discrimination within the power and hence the duty of the court to avoid.”).

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

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

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

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

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

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

ER-BGJM 30.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>3</sup> A law will be upheld against an equal protection challenge if any rational basis exists for the law, regardless of what reason, if any, the agency may have articulated for it. *Beach Communications*, 508 U.S. at 315; *Lazy Y Ranch*, 546 F.3d at 589-590. But the agency’s rationale can inform the court’s analysis of whether a rational basis exists. *Lazy Y Ranch*, 546 F.3d at 590-591.

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

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

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

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

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

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

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

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

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

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

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

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

U.S.S.G. §1B1.10(b)(2)(B) (effective Mar. 3, 2008).

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

reduction proceedings under the pre-2011 version of U.S.S.G. §1B1.10(b)(2). 623 F.3d 908, 910 (9th Cir. 2010) (“By stating that the policy statement is ‘generally’ not applicable this leaves discretion with the district judge to determine its applicability.”); *see also United States v. Curry*, 606 F.3d 323, 327-329 (6th Cir. 2010) (district court had discretion to apply retroactive amendment when the previous variance was not based on disagreement with drug quantity table); *United States v. Wilkerson*, No. 00-CR-10426-MLW, 2010 WL 5437225, \*2 (D. Mass. Dec. 23, 2010) (granting comparable reduction because initial variance was not based on crack/powder disparity); *United States v. Reid*, 566 F. Supp. 2d 888, 894-95 (E.D. Wis. 2008) (“If the departure or variance failed to account for the crack/powder disparity, a further reduction would . . . more likely be warranted,” but “if . . . the court accounted for the disparity, a further reduction . . . may not be warranted.”); *United States v. Porter*, No. 03-CR-00910-CPS, 2009 WL 455475, \*3 (E.D.N.Y. Feb. 23, 2009) (declining to reduce sentence because court “took into account the disparity”). Thus by 2011 it was clear that courts in retroactive sentence reduction proceedings could continue to incorporate previous downward departures and variances except for those cases where the basis of the downward variance was disagreement by the district judge with the offense level affected by the guideline amendment.

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

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

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

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

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

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<sup>5</sup> See Transcript of Public Hearing Before the U.S. Sentencing Commission at 49-52, 59-60, 61-62, 93, 101-12 (June 1, 2011); Statement of Michael Nachmanoff on Behalf of the Federal Public and Community Defenders Before the U.S. Sentencing Commission at 24-26 (June 1, 2011); Testimony of David Debold on Behalf of the Practitioners Advisory Group at 7-8 (June 1, 2011).

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

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

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

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

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

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

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

modifying sentences pursuant to retroactive guideline amendments to incorporate the below-guideline sentence imposed at the original sentencing, just as they would continue to implement any guideline adjustment. Although §1B1.10 was amended several times, the policy statement until 2008 always said that the court “should consider” the sentence it “would have imposed” had the amendment been in effect. U.S.S.G. §1B1.10(b) (2006); U.S.S.G. §1B1.10(b) (1989). In 1994, the Commission deleted a limitation that the reduction “may not exceed the number of months by which the maximum of the guideline range . . . has been lowered,” U.S.S.G. app. C amend. 504. In 1997, the Commission made explicit that “[w]hen the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate.” U.S.S.G. §1B1.10, cmt n.3 (1997); U.S.S.G. app. C amend. 548.<sup>6</sup>

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

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

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

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

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

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

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

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

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

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

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

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

*Figueroa*, 362 F.3d 1042, 1052-1053 (9th Cir. 2004) (Pregerson, J., concurring).<sup>7</sup>

With respect to the first of these tests, the constitutionality of retroactive legislation is “conditioned on a rationality requirement beyond that applied to other legislation.” *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring). The previous section of this brief explained that there is no rational basis at all, much less to a standard “beyond that applied to other legislation,” for denying the full extent of the retroactive sentencing reduction to the offenders who previously received downward departures and variances. The denial of the reduction fails the rationality requirement under the first prong of the *Carlton* test.

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

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<sup>7</sup> Although the current U.S.S.G. §1B1.10(b)(2)(A) purports to apply retroactively through Application Note 8, which says that “...the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant’s term of imprisonment,” no statutory authority addresses the due process concerns raised here. Thus, “Congress itself has [not] affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.” *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSION

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

Dated this the 10th day of March, 2016.

/s/ Stephen R. Sady

Stephen R. Sady  
Attorney for Defendants/Appellants

/s/ Bryan E. Lessley

Bryan E. Lessley  
Attorney for Defendants/Appellants

/s/ Elizabeth G. Daily

Elizabeth G. Daily  
Attorney for Defendants/Appellants

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

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

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**STATEMENT OF RELATED CASES**

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I, Bryan E. Lessley, undersigned counsel of record for defendants-appellants, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that the following cases should be deemed related. *United States v. Jose Hernandez-Martinez*, No. 15-30309; *United States v. Efigenio Aispuro-Aispuro*, No. 15-30310; *United States v. Alejandro Renteria-Santana*, No. 15-30315; *United States v. Jose Garcia-Zambrano*, No. 15-30351; *United States v. Edwin Magana-Solis*, No. 15-30352; *United States v. Diego Bermudez-Ortiz*, 15-30353; *United States v. Luis Pulido-Aguilar*, No. 15-30354; *United States v. Jose Carranza Gonzalez*, No. 15-30377;

*United States v. Eduardo Bocanegra-Mosqueda*, No. 15-30383; *United States v. Aleksander Gorbatenko*, No. 15-30385; *United States v. Roberto Cervantes-Esteva*, No. 15-30391; *United States v. Obdulio Alvarado-Ponce*, No. 16-3000; *United States v. Omar Perez-Medina*, No. 16-30004; *United States v. Brito*, No. 15-30229; *United States v. Favela Gonzales*, No. 15-30347; *United States v. Snyder*, No. 16-30035; *United States v. Snyder*, No. 16-30036; *United States v. Snyder*, No. 16-30037; *United States v. Castaneda*, No. 16-30040; *United States v. Aguilar-Sahagun*, No. 16-30041, and *United States v. Mahan*, No. 15-30365.

DATED: March 10, 2016

/s/ Bryan E. Lessley

Bryan E. Lessley

Attorney for Defendants-Appellants

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

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

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

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

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

DATED this 10th day of March, 2016.

/s/Bryan E. Lessley

Brian E. Lessley  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on March 10, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

/s/ Annalee Love

Annalee Love

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

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

ARMANDO PADILLA-DIAZ,  
JEFFREY ALLEN HECKMAN JR.,  
BERNARDO CONTRERAS GUZMAN,  
JESUS MORALES,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
THE HONORABLE MICHAEL W. MOSMAN  
THE HONORABLE MICHAEL H. SIMON  
UNITED STATES DISTRICT JUDGES  
USDC NOS. 3:08-CR-00126-MO, 3:10-CR-00143-MO, 3:12-CR-00291-SI

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ANSWERING BRIEF OF PLAINTIFF-APPELLEE

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## **STATEMENT OF JURISDICTION**

The district courts had jurisdiction over defendants' motions to reduce their sentences pursuant to 18 U.S.C. § 3582(c)(2). This Court has jurisdiction under 18 U.S.C. §§ 3742(a)(1) and (2), and 28 U.S.C. § 1291.

## **ISSUES PRESENTED**

When they were originally sentenced for drug trafficking offenses, defendants received significant downward variances or departures. Thereafter, the Sentencing Commission lowered most drug guidelines by two levels (Amendment 782) and declared that the amendment could apply retroactively in a manner consistent with the guidelines (Amendment 788). To determine if defendants were eligible for the reduction, the district courts applied the lower guideline, but left all other calculations the same; prior departures or variances (except for substantial assistance) could not be considered. Because their sentences fell either at or below the amended guideline range, defendants were deemed ineligible for the reduction; they claim this violated 28 U.S.C. § 991(b)(2)(A), Equal Protection, and Due Process.

## STATEMENT OF FACTS

Pursuant to this Court's order, this brief consolidates four cases: *United States v. Padilla-Diaz*, No. 15-30279; *United States v. Heckman*, No. 15-30294; *United States v. Contreras Guzman*, No. 15-30375; and, *United States v. Morales*, No. 15-30376. Appellate Scheduling Order 7. The facts relevant to each individual case are addressed first, followed by facts common to the defendants.

### 1. **United States v. Padilla-Diaz**

In January of 2010, Armando Padilla-Diaz pleaded guilty to Conspiracy to Distribute and Possess with Intent to Distribute 500 Grams or More of a Mixture and Substance Containing a Detectable Amount of Methamphetamine. ER-APD 72.<sup>1</sup> The relevant and undisputed guideline calculations were as follows:

- Base Offense Level (500–1500 grams of methamphetamine) 38
- Organizer, Leader, Manager or Supervisor +2
- Acceptance of responsibility -3

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<sup>1</sup> Consistent with the defendants' filings, "ER" refers to Excerpts of Record, "SER" refers to Sentencing Excerpts of Record, followed by an additional designation identifying the specific defendant. "APD" refers to Armando Padilla-Diaz. "JH" refers to Jeffrey Heckman. "BGJM" refers to both Bernardo Guzman and Jesus Morales, who filed joint pleadings in their application for sentence reductions.

- Adjusted Offense Level 37
- Criminal History Category I
- Advisory Guideline Range 210-262 months

Statement of Reasons at 2, (ECF No. 254, *United States v. Osegera-Gonzalez*, No. 3:10-cr-70026 (D. Or. April 14, 2010)).

Pursuant to a plea agreement, the government also recommended two downward variances. ER-APD 75. First, the government recommended a two-level downward variance because defendant agreed not to challenge wiretaps or seek to suppress statements or physical evidence. ER-APD 75. Second, the government recommended a one-level downward variance because defendant agreed not to seek a lesser sentence. ER-APD 75. The district court granted the variances, and sentenced defendant to 151 months. ER-APD 48.

When the Sentencing Commission lowered most 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-APD 46. Following the procedure set forth in U.S.S.G. § 1B1.10(b) resulted in an amended guideline level 35, I, for an amended guideline range of 168 to 210 months, which is greater than defendant's sentence. If the combined variances of three levels

pursuant to § 3553(a) are factored in as defendant claims they should be, it would result in a guideline range of 121 to 151 months.

Because defendant's 151 month sentence fell below his amended guideline range of 168 to 210 months, the district court denied his motion to reduce. ER-APD 1.

## **2. United States v. Heckman**

In February of 2011, Jeffrey Heckman pleaded guilty to Distribution of a Mixture or Substance Containing a Detectable Amount of Methamphetamine. ER-JH 98. The relevant and undisputed guideline calculations were as follows:

- Base Offense Level (500–1500 grams of methamphetamine) 32
- Acceptance of responsibility -3
- Adjusted Offense Level 29
- Criminal History Category II
- Advisory Guideline Range 97-121 months

Statement of Reasons at 2, *United States v. Heckman*, No. 3:10-cr-00143 (D. Or. July 7, 2011), ECF No. 23.

The district court granted the parties' jointly recommended four-level downward departure and sentenced defendant to 63 months. The departure was based on the drug quantity table for methamphetamine

overstating the seriousness of defendant's conduct as he believed he was selling MDMA, not methamphetamine. ER-JH 80, 98; Statement of Reasons at 2, *United States v. Heckman*, No. 3:10-cr-00143 (D. Or. July 7, 2011), ECF No. 23.

In 2014, defendant filed a motion asking the court to reduce his sentence in light of guideline amendments 782 and 788 pursuant to 18 U.S.C. § 3582(c)(2). ER-JH 46. A two-level reduction yielded an offense level 27, II, for an amended guideline range of 78 to 97 months, which is greater than defendant's sentence. If the four-level non-substantial assistance departure is factored in as defendant claims it should be, it would result in a guideline range of 51 to 63 months.<sup>2</sup>

Because defendant's 63 month sentence fell below his amended guideline range of 78 to 97 months, the district court denied defendant's motion to reduce. ER-JH 1.

### **3. United States v. Morales**

In May of 2013, Jesus Morales pleaded guilty to Conspiracy to Distribute Heroin and Methamphetamine and Using Communication

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<sup>2</sup> Defendant was released from custody on April 7, 2016. The defense does not believe his release moots this appeal, and the government is not contesting their position.

Devices. *See* ER-BGJM 153, 195. The relevant and undisputed guideline calculations were as follows:

- Base Offense Level (10,000-30,000 kilograms of marijuana) 36
- Acceptance of Responsibility -3
- Safety Valve -2
- Adjusted Offense Level 31
- Criminal History Category I
- Advisory Guideline Range 108-135 months

Statement of Reasons at 2, *United States v. Guzman*, No. 3:12-cr-00291 (D. Or. Oct. 10, 2013), ECF No. 240.

Per the plea agreement, the parties jointly recommended a two-level downward variance for “Resolution of a Complex Case” and a further two-level reduction to avoid unwarranted disparities with co-conspirator sentences. ER-BGJM 131, 154. The district court granted the variances and sentenced defendant to 70 months. ER-BGJM 124.

In 2014, defendant filed a motion asking the court to reduce his sentence in light of Amendments 782 and 788 pursuant to 18 U.S.C. § 3582(c)(2). ER-BGJM 115. A two-level reduction yielded an offense level 29, I, for an amended guideline range of 87-108 months, which is greater than defendant’s sentence. If the combined variances of four-

levels pursuant to § 3553(a) are factored in as defendant claims they should be, it would result in a guideline range of 57 to 71 months.

Because defendant's 70 month sentence fell below his amended guideline range of 87-108 months, the district court denied defendant's motion to reduce. ER-BGJM 1.

#### **4. United States v. Guzman**

In May of 2013, Bernardo Guzman pleaded guilty to Conspiracy to Distribute Heroin and Methamphetamine and Using Communication Devices. *See* ER-BGJM 164, 182. The relevant and undisputed guideline calculations were as follows:

|                                                             |                |
|-------------------------------------------------------------|----------------|
| • Base Offense Level (10,000-30,000 kilograms of marijuana) | 36             |
| • Acceptance of Responsibility                              | -3             |
| • Safety Valve                                              | -2             |
| • Adjusted Offense Level                                    | 31             |
| • Criminal History Category                                 | I              |
| • Advisory Guideline Range                                  | 108-135 months |

Statement of Reasons at 2, *United States v. Guzman*, No. 3:12-cr-00291 (D. Or. Aug. 14, 2013), ECF No. 210.

Per the plea agreement, the parties jointly recommended a two-level downward variance for "Resolution of a Complex Case." ER-BGJM

165. The district court granted the variance and sentenced defendant to 87 months. ER-BGJM 139.

Like the others, defendant filed a motion asking the court to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) prompted by Amendments 782 and 788. ER-BGJM 113. A two-level reduction yielded an offense level 29, I, for an amended guideline range of 87 to 108 months, which is the same as defendant's sentence. If the two-level § 3553(a) variance is factored in as defendant claims it should be, it would result in a guideline range of 70 to 87 months.

Because defendant's 87 month sentence matched the low-end of his revised advisory guideline range, the district court denied his motion to reduce. ER-BGJM 2.

## **5. Facts Relevant to Multiple Defendants**

Each plea agreement included an appellate and post-conviction waiver that precluded each defendant from attacking his conviction or sentence; the waiver specifically excepted motions to reduce under 18 U.S.C. § 3582(c). ER-APD 78, ER JH 102-103, ER-BGJM 155,166.

Although the district courts made threshold determinations that each defendant was ineligible for relief under the guideline's plain

language, the courts recognized the defendants' arguments that they may nevertheless be entitled to relief if the guideline restrictions were illegal or unconstitutional. For Bernardo Guzman and Jesus Morales, the judge reasoned that, (1) neither departures nor variances constituted "guideline application decisions" included in the guidelines' meaning of an "amended guideline range," (2) that the guideline limiting further reductions was consistent with the statute establishing the Sentencing Commission and its purposes (28 U.S.C. § 991), and (3) that it did not violate the Equal Protection Clause—applying rational basis review. ER-BGJM 21, 24, 34-35. And for the two defendants who raised a Due Process argument, the district court—also applying rational basis review—found no violation and rejected defendants' suggestion that they held any sort of "settled expectation" in a future sentence reduction. ER-JH 2-3, ER-APD-2-3. These appeals followed.

### **SUMMARY OF THE ARGUMENT**

Defendants are ineligible for retroactive sentence reductions because they received significant downward variances or departures at their original sentencing hearings, and as a consequence, the recent guideline amendments have no effect. Although they never stipulated

to this fact, defendants do not claim that they are entitled to relief under the guidelines' plain language.

The district courts properly rejected defendants' various attacks on the guideline provision that grants relief to some while denying relief to others who already received sentences well below their advisory guideline ranges. The district courts were not writing on a blank slate; indeed, previous guideline reductions that drew similar lines have been thoroughly litigated and none of those other challenges have succeeded. Defendants have not cited, and the government is not aware of, any retroactive guideline reduction limitation that has been successfully challenged in any federal circuit court. The guideline effectuating Amendment 782 is, as this Court has already recognized, consistent with its implementing statute. Moreover, because the guideline rationally separates those who received variances and downward departures from those who did not, and those who provided assistance from those who did not—opting to afford relief to the group most adversely affected by the guidelines' emphasis on drug quantity—it survives rational basis review. And because defendants had no settled expectation at their original sentencing hearings that they would be

eligible for any and all future sentencing reductions regardless of limitations the Sentencing Commission opted to impose, their Due Process attacks were also properly rejected.

## 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. 2006).

## ARGUMENT

### **1. The District Courts Correctly Denied Defendants' Sentence Reductions Because their Sentences Were Already Below or At the Low-End of their Amended Guideline Ranges.**

The Supreme Court has recognized that, as a general rule, sentences are final and may not be modified except in limited circumstances. *Dillon v. United States*, 560 U.S. 817, 819 (2010). 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.” *Id.* 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. U.S.S.G. 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 these cases. *See* U.S.S.G. § 1B1.10(b)(2)(B). Guideline Application Note 1(A) further explains that the amended guideline range contemplated by this provision does not include departures or variances. Notes 3 and 4 describe the process by which

cases involving substantial assistance departures should be calculated, using a relative percentage reduction.<sup>3</sup>

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*, 624 F. App'x. 542, 543 (9th Cir. 2015); *United States v. Parker*, 617 F. App'x 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. *Tercero*'s original guideline range was 84-105 months; however, she received a downward departure to 72 months based upon § 3553(a) factors. *Id.* at 980. Applying a retroactive guideline amendment that reduced crack cocaine guidelines yielded a 70-87

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<sup>3</sup> Although neither party claims that guideline § 1B1.10 is ambiguous as applied to these cases, there was an ambiguity identified shortly after Amendments 782 and 788 went into effect: whether a defendant who received a substantial assistance departure—along with a variance or a departure on other grounds—was eligible for a proportional reduction below the amended guideline range which included the non-substantial assistance part of the reduction. Ultimately, the government agreed that defendants in that situation should be considered eligible for a proportional reduction and district courts accepted that interpretation.

month amended range. *Id.* at 981. This Court held that Tercero'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 Davis's motion to reduce his sentence because § 1B1.10(b) prohibits a reduction below the low-end of the amended guideline 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*, 624 F. App'x. at 543, and *United States v. Parker*, 617 F. App'x. at 807; see also *United States v. Salinas-Ospina*, 622 F. App'x. 577, 579 (7th Cir. 2015) (rejecting an ex post facto challenge to § 1B1.10's application to Amendment 782).

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 reductions defendants seek are based on § 3553(a) variances or departures they received at their original sentencing hearings, they are ineligible for corresponding reductions below the low-end of their amended guideline ranges. The district courts' conclusions in these cases are 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. Garcia-Uribe*, 1:08-CR-30039-PA (Opinion, D. Or. Oct. 6, 2015); *United States v. Mahan*, 6:06-CR-60045-AA-1 (Opinion, D. Or. Nov. 4, 2015); *United States v. Pulido-Aguilar*, 3:10-CR-142-KI (Opinion, D. Or. Nov. 5, 2015); *United States v. Carranza Gonzalez*, 3:12-CR-154-SI (Opinion, D. Or. Dec. 2, 2015);. *United States v. Alarcon Castaneda*, 3:11-CR-00412-BR (Opinion, D. Or. Jan. 8, 2016), and *United States v. Lopez-Prado*, 3:10-CR-00510-JO-3 (Opinion, D. Or. March 24, 2016).

## 2. Guideline § 1B1.10 is Lawful and Constitutional

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

Faced with the prohibition in § 1B1.10, defendants claim that § 1B1.10 is inconsistent with 28 U.S.C. § 991(b) because it fails to afford “sufficient flexibility to permit individualized sentencing decisions.” Appellants’ Br. 24 (quoting § 991(b)). 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).

Defendants contend that the limits in § 1B1.10 conflict with this flexibility. But these are not appeals from original sentencing hearings, 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.

Defendants argue that *Tercero* has no bearing on their cases because, while the court in *Tercero* rejected the argument that § 1B1.10 conflicts with the guidelines' stated purpose, defendants' argument was "neither stated in the opinion nor raised by the parties." Appellants' Br. at 21. Defendants are wrong. Though the briefs in *Tercero* use different language to describe the attack on the guidelines' consistency with its implementing statute, the substance is the same.

In her opening brief, *Tercero* argued that § 1B1.10 conflicted with the "goals of the Sentencing Guidelines" of "proportionality in sentence through a system that imposes appropriately different sentences for criminal conduct of differing severity." Appellant's Opening Brief at 19, *Tercero*, 734 F.3d 979 (No. 12-10404) (citing U.S.S.G. Ch. 1, Pt. A(3) (2011)). Defendants in this case argue that § 1B1.10 violates § 991(b) because it fails "to avoid unwarranted [sentence] disparity, and to account for individualized circumstances." Appellants' Br. at 20. Claiming that the Sentencing Guidelines must "avoid unwarranted [sentence] disparities" and "account for individualized circumstances" is merely a different way of saying that the Guidelines should affect proportionate and "appropriately different sentences for criminal

conduct of differing severity.” Defendants are making the same argument raised and rejected in *Tercero*. Defendants’ argument does not “merely lurk in the record” of *Tercero*. Appellants’ Br. at 21 (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

Like in *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) (enactment of § 1B1.10(b)(2)(A) did not exceed the Commission’s authority and recognizing that Congress gave the Commission authority to resolve policy questions). Because this Court has already held that there is no conflict between § 1B1.10(b) and the Sentencing Commission’s implementing statutes, defendants’ 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.

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 courts 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.**

Defendants contend that § 1B1.10 violates the Equal Protection Clause and the Due Process Clause. It does not; this Court has already identified valid and rational bases for the limitations within § 1B1.10, and defendants never had a settled expectation in receiving speculative, future sentence reductions.

***i. Guideline § 1B1.10(b)(2)(A) does not violate the Equal Protection Clause.***

***1. Rational basis review applies to this case.***

Absent a suspect class (which defendants do not raise) or the deprivation of a fundamental right (which they fail to establish), defendants' 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 a right 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 Due Process and Equal Protection challenges 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.

*2. Section 1B1.10's distinction  
between variances and  
substantial assistance departure  
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. As the district court observed, the Sentencing Commission's decision to employ this limitation is rationally related to the goals of "reducing complexity, litigation, and disparities," "promoting conformity," and reducing potential windfalls for some defendants. ER-BGJM 34.

Defendants identify hypothetical circumstances in which the guideline scheme yields seemingly irrational results, but their

argument fails under the correct legal test. Instead of imagining unfair scenarios, defendants bear 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 defendant’s treatment 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). Conceiving a rational scenario for the challenged guideline requires no stretch of the imagination: If defendant A originally received a significant guideline variance because a judge believed that the drug guidelines were too 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 defendants cannot “negative every conceivable basis” supporting the Commission’s rule, their constitutional attacks fail. *Heller*, 509 U.S. at 320.

The fact that the guideline may permit some less-deserving defendants to receive a benefit denied to these defendants (who consider themselves more deserving) does not render the guideline irrational or unfair. Indeed, the guideline only opens the door to permit a district court to consider a further reduction; it does not guarantee any applicant relief. Thus, an eligible but undeserving defendant will not be placed in a more advantageous position than defendants.

And even if the guideline did have this effect, 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.* 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 persuasive in *United States v. Deamues*, 553 F. 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 non-substantial assistance departures, variances and substantial assistance departures.

Defendants claim that “[t]he Sentencing Commission had no evidence that ‘windfalls’ were actually a problem under previous versions of § 1B1.10(b)(2).” Appellants’ Br. at 39. Defendants rely, however, on selected testimony made before the Sentencing Commission on June 1, 2011. *Id.* at 40. At the time of the public hearing, the commission had already received over 37,000 pieces of public comment on the amendment. The Honorable Patti B. Saris, Public Testimony before the U.S.S.C. Regarding Retroactivity of Amendment 2, pertaining to Federal Drug Offenses at 5 (June 1, 2011), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing\\_Transcript.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing_Transcript.pdf). By the time the Sentencing Commission voted on the amendment, that number had apparently increased to over 43,500. The Honorable Patti B. Saris, Transcript of the Public Meeting before the U.S.S.C., at 5 (June 30,

2011), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting\\_Transcript.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting_Transcript.pdf). Defendants' claim that the Sentencing Commission had "no evidence" based upon select portions of a single transcript overlooks the enormity of the record before the Sentencing Commission.<sup>4</sup>

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.

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<sup>4</sup> Further, even if defendants' claim that the Sentencing Commission lacked evidence of windfalls is correct, it has no bearing on rational basis review. Under rationality review, the government's policy need not have a foundation in the record. *Heller*, 509 U.S. at 320. "[R]ational-basis review allows for decisions 'based on rational speculation unsupported by evidence or empirical data'" *Navarro*, 800 F.3d at 1114 (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 315). "[T]he absence of legislative facts explaining the distinction on the record has no significance in rational basis-analysis." *Beach Commc'ns, Inc.*, 508 U.S. at 315.

***ii. Guideline § 1B1.10(b) does not violate the Due Process Clause.***

Defendants Heckman and Padilla-Diaz also contend that application of guideline § 1B1.10(b) to their cases violates due process. This Court has recently rejected a similar claim. *United States v. Gasca*, 633 F. App'x 470, 471 (9th Cir. 2016). In *Gasca*, the court recognized that “[T]he sentence-modification proceedings authorized by § 3582(c)(2) are not constitutionally compelled.” *Id.* (alterations in original) (quoting *Dillon*, 560 U.S. at 828). The court also recognized that “[T]he [2011] revisions to § 1B1.10 fall squarely within the scope of Congress’s articulated role for the Commission.” *Id.* (alterations in original) (quoting *Tercero*, 734 F.3d at 983-84). As a result, the court “reject[ed] Gasca’s argument that section 1B1.10(b), as revised by the Sentencing Commission in 2011, violate[d] his right to due process.” *Id.*

Defendants’ argument is also foreclosed by the long-standing principle that defendants cannot ask this Court to apply different provisions from different guideline books at the same time. *United States v. Warren*, 980 F.2d 1300, 1305-06 (9th Cir. 1992). Defendants cannot ask this Court to lower their guidelines under the November

2014 version but use previous versions of § 1B1.10 to achieve their desired outcome.

Defendants also claim (without making an evidentiary proffer), that they “reasonably believed that they would be eligible to have their sentences reduced if the guideline range applicable to them was retroactively amended before their sentences expired.” Appellants’ Br. at 54. The Supreme Court has, however, rejected such a proposition, explaining that there is “no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments.” *Dillon*, 560 U.S. at 828. Instead, the limited authority to reduce an otherwise final sentence created by § 3582(c) “represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines.” *Id.* Congress expressly limited the scope of that lenity by directing the Commission to adopt a policy statement that “shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” 28 U.S.C. § 994(u).

A defendant has neither a “liberty interest” in a sentence reduction, nor a “legitimate” expectation of receiving such a reduction under § 3582(c). *United States v. Johnson*, 703 F.3d 464, 469-70 (8th Cir. 2013) (citation omitted); *see also Peck*, 697 F.3d at 774 (inmates have no “liberty interest” in RDAP sentence reductions).

Defendant’s reliance on *INS v. St. Cyr*, 533 U.S. 289 (2001) is inapt for several reasons. The aliens in that case were actually eligible for a discretionary waiver of removal on the date that they entered their guilty pleas; the Court considered that a vested right. *Id.* at 314-15, 321-22. Defendants, by contrast, had no vested right in future sentence reductions. The Court’s decision also did not rest on the Due Process Clause, but instead was grounded upon the absence of any evidence of Congressional intent that the provision at issue apply retroactively. *Id.* at 325-26. As a general principle, defendants do not possess a Due Process right to the benefit of new, helpful laws or decisions. *See Chaidez v. United States*, 133 S. Ct. 1103 (2013) (refusing to apply retroactively *Padilla v. Kentucky*, 559 U.S. 356 (2010)).

Defendants’ reliance on *Tyson v. Holder*, 670 F.3d 1015 (9th Cir. 2012) is similarly misguided. Like the immigrants in *St. Cyr*, the

appellant in *Tyson* was eligible to seek a § 212(c) waiver when she was initially convicted. *Id.* at 1021. Once again, this presents a stark contrast to defendants, who had no vested right to a future sentence reduction at the time of sentence.

Defendants attempt to further complicate the argument by noting that “the district court [that decided defendants’ cases] did not cite any authority for the proposition that *St. Cyr* requires a particular degree of certainty about future eligibility.” Appellants’ Br. at 53. However, both *St. Cyr* and *Tyson* demonstrate that certainty of future eligibility is an important factor in determining whether defendants had reasonably relied on their perceived benefit. *See, e.g., Tyson*, 670 F.3d at 1022 (“Significantly, at the time [the defendant] brought heroin into the United States, the INA held out a *very real possibility* that she would qualify for discretionary relief from removal” (emphasis added)); *St. Cyr*, 533 U.S. at 323 (“Given the frequency with which § 212(c) relief was granted in the years leading up to [the 1996 amendments], preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial”); *see also Alcozy v. U.S.*

*Citizenship & Immigration Servs.*, 704 F.3d 795, 799 (9th Cir. 2012) (“Even if we were to conclude that section 321(b) is not retroactive, which we do not, we are convinced that a person in Alocozy’s situation could not have any ‘settled’ or even *reasonable belief or expectation* that a plea to a serious felony would not impair any future attempt to pursue naturalization as a United States citizen. Whereas the Court found *considerable authoritative support* in *St. Cyr* for the reasonableness of *St. Cyr*’s expectations” (emphasis added) (citing *St. Cyr*, 533 U.S. at 322)); *United States v. Gonzalez*, 429 F.3d 1252, 1257 (9th Cir. 2005) (“Thus, unlike *St. Cyr*, whose eligibility for relief was based solely on the exercise of the Attorney General’s discretion under § 212(c), the possibility of relief for Gonzalez was remote. In these circumstances, we cannot conclude that he had settled expectations of relief when he pled guilty to the aggravated felony, within the meaning of *St. Cyr*”). Unlike in *St. Cyr* and *Tyson*, any alleged expectation of a sentencing reduction was not likely—let alone vested—at the time of defendants’ guilty pleas.

Defendants’ reliance on *United States v. Carlton*, 512 U.S. 26 (1994) is also inapt. The case is entirely irrelevant because it involved a

Due Process challenge (rejected) to a retroactively applicable federal estate tax. *Id.* at 28.

While any claimed reliance upon anticipated future guideline changes is not objectively reasonable, there is also nothing in this record to support a reasonable subjective expectation either. An examination of defendants' plea agreements reveals that the only settled expectations defendants had were that they did not waive their rights to file motions based on retroactive changes to the applicable guidelines. Defendants have filed such motions, and the government has not argued that the motions are foreclosed under the plea agreement, satisfying the only reasonable expectation they could have.

Neither they nor the government knew when they entered their pleas if or whether the Commission would reduce the drug guidelines levels any further, and if so, how that reduction might be executed. Had the Commission decided to reduce guidelines for fraud offenses instead of drug offenses, defendants would be no more entitled to reductions than they are now.

To the extent defendants also claim that their ineligibility for further reductions results in the "loss" of their original variances or

departures, this Court rejected that argument in *Davis*:

Finally, we reject Davis's contention that amended 1B1.10(b) violates the separation of powers doctrine because it requires the district court to rescind a previously granted departure or variance. First, there has been no such rescission in fact: Davis retains the benefit of his original variance that resulted in a 70-month sentence.

739 F.3d at 1225. Although *Davis* rejected the argument in the context of a separation of powers claim, its reasoning and rejection of the notion that a later-adopted reduction somehow results in the loss of a previously conferred benefit makes sense. Defendants have lost nothing by virtue of Amendment 782; they simply have not gained additional benefits because they are ineligible for this particular reduction.

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## CONCLUSION

The district courts' judgments should be affirmed.

Dated this 23rd day of May 2016.

Respectfully submitted,

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United States Attorney

s/ Kelly A. Zusman  
KELLY A. ZUSMAN

s/ Jeffrey S. Sweet  
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## 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. Sergio Aguilar-Sahagun; Case No. 16-30041
- 2) U.S. v. Efigenio Aispuro-Aispuro; Case No. 15-30310
- 3) U.S. v. Diego Bermudez-Ortiz; Case No. 15-30353
- 4) U.S. v. Eduardo Bocanegra-Mosqueda; Case No. 15-30383
- 5) U.S. v. Julian Castaneda; Case No. 16-30040
- 6) U.S. v. Roberto Cervantes-Esteva; Case No. 15-30391
- 7) U.S. v. Carlos Garcia-Uribe; Case No. 15-30306
- 8) U.S. v. Jose Garcia-Zambrano; Case No. 15-30351
- 9) U.S. v. Bartolo Favela Gonzales; Case No. 15-30347
- 10) U.S. v. Jose Carranza Gonzalez; Case No. 15-30377
- 11) U.S. v. Aleksander Gorbatenko; Case No. 15-30385
- 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. Pablo Lopez; Case No. 1630090
- 16) U.S. v. Moises Lopez-Prado; Case No. 16-30089
- 17) U.S. v. Luis Pulido-Aguilar; Case No. 15-30354
- 18) U.S. v. Alejandro Renteria-Santana; Case No. 15-30315
- 19) U.S. v. Darrell Snyder; Case No. 16-30035

## **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 6,178 words.

*s/ Jeffrey S. Sweet*

**JEFFREY S. SWEET**

Assistant United States Attorney

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## 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.

## **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).

9th Circuit Case Number(s)

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June 15, 2016

Molly Dwyer  
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San Francisco, CA 94119-3939

Re: Rule 28(j) Letter  
*United States v. Armando Padilla-Diaz*, CA No. 15-30279  
*United States v. Jeffrey Allen Heckman, Jr.*, CA No. 15-30294  
*United States v. Bernardo Contreras Guzman*, CA No. 15-30375  
*United States v. Jesus Morales*, CA No. 15-30376  
[Consolidated cases]

Dear Ms. Dwyer:

We are writing to alert the Court to the recent ruling in *United States v. Hector Ornelas*, No. 15-10522, 2016, WL 3126272 (9th Cir. June 3, 2016), a published decision that ruled that when considering a motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2), a court must determine the applicable guideline range prior to considering a U.S.S.G. § 4A1.3 departure for criminal history. *Id.* at \*15. In doing so, the Court reaffirmed that a sentence reduction is not authorized if a retroactive amendment does not lower a defendant's applicable guideline range, and that a court must not consider any departures or variances when calculating the guideline range for purposes of § 1B1.10. *Id.* at \*4, 9.

Sincerely,

BILLY J. WILLIAMS

United States Attorney

s/ Jeffrey S. Sweet

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cc: Stephen R. Sady, Chief Federal Public Defender  
Bryan E. Lessley, Assistant Federal Public Defender

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

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**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**v.**

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

**Defendants-Appellants.**

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

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**APPELLANTS' REPLY BRIEF**

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## Introduction

These consolidated appeals raise, as matters of first impression, serious statutory and constitutional challenges to a guideline policy statement that arbitrarily denies eligibility for retroactive sentence reductions to defendants who had sufficient mitigating factors to justify a downward departure or variance at the time of sentencing, while granting eligibility to defendants who did not. The government's response claims that the Sentencing Commission had authority to choose how to implement retroactive guideline amendments and that "some inequality" does not render the scheme unconstitutional. But the government's response fails to rebut the proposition that unwarranted disparity is the primary effect of this guideline policy statement, in violation of both the Commission's statutory directive for *all* sentencing practices and policies and the Constitution's requirement of equal protection.

On the due process argument, the government's response simply knocks down a straw man by showing that these defendants did not have a settled expectation that they would *receive* a sentence reduction. But the defendants expected to be *eligible for consideration* for a sentence reduction if their guideline range were later retroactively reduced, as occurred here. The defendants' expectations were reasonable, because they were based on § 1B1.10 as it had existed from its inception

until the time of their guilty pleas, which allowed reductions to include downward variances and departures.

**A. The Current Version Of Section 1B1.10 Conflicts with 28 U.S.C. § 991(b)(1)(B)’s Requirement That All Sentencing Policies And Practices Must Avoid Unwarranted Disparity While Maintaining Sufficient Flexibility To Make Individualized Sentencing Determinations.**

The statutory directive in 28 U.S.C. § 991(b)(1)(B) requires that all “sentencing policies and practices” meet certain criteria, including avoiding unwarranted sentencing disparity while permitting sufficient flexibility to make individualized sentencing decisions. Op. Br. at 15-24. Without explaining how § 1B1.10 meets these criteria, the government contends that the policy statement does not conflict with 28 U.S.C. § 991(b). The government’s response is twofold: (1) the government argues that this issue has already been decided by other cases, and (2) the government argues that § 991(b) does not apply to retroactive sentencing reduction proceedings conducted under 18 U.S.C. § 3582(c). Resp. Br. at 16-20. Both contentions fail.

*1. The Government’s Brief Does Not Explain Why No Statutory Conflict Exists, And No Precedent Addresses The Statutory Issue Raised In This Case.*

The government’s response never explains why the defense position is wrong on its merits, except in the most generalized way. The response brief explains that the Commission has authority to implement retroactive guideline amendments,

Resp. Br. at 17 (citing 28 U.S.C. § 994(u)), and points out that sentence reductions under 18 U.S.C. § 3582(c) are limited adjustments to an otherwise final sentence, not plenary resentencings, Resp. Br. at 17 (citing *United States v. Tercero*, 734 F.3d 979, 983 (9th Cir. 2013)). These propositions are uncontroversial and undisputed, but they do not answer the question of whether the Sentencing Commission’s current version of § 1B1.10 implements retroactive guideline amendments in a manner that conflicts with the statutory directives in 28 U.S.C. § 991(b).

As set out in the Opening Brief, the original sentencing judge necessarily took all of the § 3553(a) factors into account in determining a sentence sufficient, but not greater than necessary, to fulfill the purposes of sentencing set out in that section. Those factors incorporate the § 991(b) criteria, including 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 guideline range plays a “central role” in that determination and provides “*in a real sense the basis for the sentence.*” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (quoting *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013)) (emphasis in original); *United States v. Tyrone Davis*, No. 13-30133, 2016 WL 3245043, at \*10 (9th Cir. June 13, 2016) (en banc) (Rule 11 (e)(1)(C) pleas are based on the

guidelines: “by statute, a sentencing judge’s discretion is always framed by the Guidelines”).

A limited sentence reduction proceeding should not categorically disturb the original sentencing court’s rulings regarding factors that require a variance from the guideline range. By nullifying the downward variance and non-cooperation departures previously found to be appropriate, the 2011 version of § 1B1.10 injects disparity, nullifies previous individual sentencing determinations that were keyed to the original guideline range, and fails to “leave all other guideline applications unaffected” within the framework of *Dillon v. United States*, 560 U.S. 817, 831 (2010). Op. Br. at 18-21.

The government’s claim that other cases have already rejected a statutory conflict with § 991(b) is remarkable because the three cases cited – *Dillon*, *Tercero*, and *United States v. Edmund Davis*, 739 F.3d 1222 (9th Cir. 2014) – never mention the issue, much less reject it.<sup>1</sup> Neither of the key criteria in § 991(b) – avoiding unwarranted disparity and maintaining sufficient flexibility to permit individualized decisions – are ever discussed in any of the three cases. In light of this silence, the government contends that the cases simply use “different language” to address the

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<sup>1</sup> To avoid confusion, the panel *Edmund Davis* and en banc *Tyrone Davis* opinions are referenced using the defendant’s different first names.

same substance. Resp. Br. at 18. The government's position fails to credit court opinions with the virtue of meaning what they say. *See Mathis v. United States*, No. 15-6092, 2016 WL 3434400, at \*9 (U.S. June 23, 2016) (“[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same[.]”).

Taking the cases in order, *Dillon* held that § 3582(c) does not authorize a plenary resentencing that allows a district judge to revisit previous sentencing decisions or sentence someone anew. *Dillon*, 560 U.S. at 825-26. Therefore, a defendant in a retroactive sentence reduction proceeding under § 3582(c) cannot receive downward variances that were not granted in the original sentencing proceeding. The present version of § 1B1.10 creates the opposite factual situation from the one considered in *Dillon*: the retroactive sentence reduction proceeding purports to categorically nullify or limit downward variances and departures that were previously granted. Op. Br. at 17-18, 20. *Dillon* did not discuss § 991(b): there was no occasion to assure compliance with the requirements of avoiding disparity and encouraging individual sentences because the Court required adherence to the decisions of the original sentencing court, as defendants seek in the present case.

The second decision is *Tercero*. The government does not dispute that § 991(b) was never mentioned in the *Tercero* opinion. Op. Br. at 21-24. The

government's argument is that *Tercero* simply addressed the same substance in different language because the references to a "fair sentencing system" and "honest, uniform and proportionate sentences" raised the same concepts as § 991(b). Resp. Br. at 18. The issue decided in *Tercero* – whether § 1B1.10 is consistent with the Sentencing Commission's own statement of its purposes in U.S.S.G. § Ch. 1, Pt. A(3) – is far different from the issue whether the Commission's actions violate an explicit command in its authorizing statute. *See Tercero*, 734 F.3d at 983; *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"). Moreover, the Court's generalized consideration of vague arguments regarding broadly articulated policies in *Tercero* fails to answer the detailed claims raised here – that § 1B1.10 disturbs the decisions of the original sentencing judge by categorically nullifying warranted departures and variances from the guideline range.

The third decision is *United States v. Edmund Davis*, where the Court held that § 1B1.10 does not conflict with the directive appearing in 28 U.S.C. § 994(a)(2) that the Commission promulgate policy statements that, "in the view of the Commission," further the purposes of sentencing set out in 18 U.S.C. § 3553(a)(2). 739 F.3d at 1225. The government's argument that *Edmund Davis*'s holding relates

to § 991(b) fails for three reasons. First, the Court in *Edmund Davis* never mentioned § 991(b). Second, § 991(b) differs in critical respects from § 994(a)(2). The former statute creates objective standards that sentencing policies must meet, whereas § 994(a) includes a subjective “in the view of the Commission” qualifier. Additionally, § 994(a), by its reference to § 3553(a)(2), does not cover the same criteria as § 991(b). The purposes of sentencing that a court is required to consider under § 3553(a)(2) are:

the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2). There is nothing in that language about disparity or individualized sentences. The fact that *Edmund Davis* found no conflict between § 1B1.10 and a different statute that sets out different considerations does not bind this Court as to the issue raised by the defendants here pertaining to § 991(b).

2. *Other Cases Cited By The Government Are Not Persuasive Because They Also Did Not Address The Issues Raised Here.*

The government's brief cites cases in which this Court and other courts have rejected challenges to § 1B1.10 on grounds unrelated to those raised here. Those cases are not persuasive authority to reject the present challenges.

First, there are no challenges to previous guideline reduction limitations that “drew similar lines” to the policy statement challenged here, Resp. Br. at 10, because every previous version of § 1B1.10 has allowed previously-awarded downward departures and variances to be incorporated into retroactive guideline reductions. The defendants have already traced this history in detail. Op. Br. at 42-44. The 2011 amendment to § 1B1.10 was the first amendment that purported to prohibit or limit retroactive reductions for persons who were previously determined to be deserving of below-guideline sentences. Accordingly, the reason the defense cannot cite previous successful challenges to the limitations set out in § 1B1.10(b) is that no similar limitations existed before 2011.

Second, circuit court and district court opinions that have rejected other challenges to the new limitation are not persuasive authority for the challenges raised here. The government argues, for example:

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*, 624 F. App'x [542, 543 (9th Cir. 2015)], and *United States v. Parker*, 617 F. App'x [806, 807 (9th Cir. 2015)]; see also *United States v. Salinas-Ospina*, 622 F. App'x 577, 579 (7th Cir. 2015) (rejecting an ex post facto challenge to § 1B1.10's application to Amendment 782).

Resp. Br. at 14. None of these cases have any bearing on any issue raised here. *Aragon-Rodriguez* involved an issue about the meaning of the term “amended guideline range” as it appears in Amendment 782. That issue is not raised here. *Parker* was a pro se appeal, and the two-paragraph opinion does not state what issue the defendant might have been raising. *Salinas-Ospina* raised an ex post facto issue, which, again, is not raised here.

In a letter submitted pursuant to Federal Rule of Appellate Procedure 28(j), the government cites *United States v. Ornelas*, No. 15-10522, 2016 WL 3126272 (9th Cir. June 3, 2016). *Ornelas* focused on how a court determines a defendant's “applicable guideline range” under § 1B1.10(a)(2)(B). 2016 WL 3126272, at \*2. Specifically, the Court held that “a court must calculate the guideline range applicable to the defendant before considering any departure, including a departure under § 4A1.3.” *Ornelas*, 2016 WL 3126272, at \*5. *Ornelas* never considered any challenge to the purported limitation on the extent of permissible reductions set forth in § 1B1.10(b)(2)(A). Neither the reasoning nor the holdings of *Ornelas* or the other unpublished dispositions cited provides relevant persuasive authority here.

3. *The Supreme Court's Recent Opinion In Molina-Martinez Reinforces The Requirement That Sentence Reduction Proceedings Must Preserve The Relationship Between The Ultimate Sentence And The Guideline Range.*

The Supreme Court's recent decision in *Molina-Martinez* makes clear that the advisory Guidelines play a critical role in sentencing, confirming that § 3582(c) sentence reduction proceedings should not categorically nullify justified variances and departures from the guideline range. 136 S. Ct. 1338 (2016). In *Molina-Martinez*, the district court sentenced the defendant within an incorrect, higher guideline range. *Id.* at 1341. However, the defendant's sentence fell within the corrected guideline range. *Id.* at 1344. The Fifth Circuit Court of Appeals refused to remedy the error, finding that the defendant could not establish a reasonable probability that, but for the error, he would have received a different sentence. *Id.* at 1344-45. The Supreme Court reversed. *Id.* at 1349.

The Court's reasoning turned on the "significant role" the advisory Guidelines play in sentencing:

The Court has made clear that the Guidelines are to be the sentencing court's "starting point and . . . initial benchmark." Federal courts understand that they "*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." The Guidelines are "the framework for sentencing" and "anchor . . . the district court's discretion." "Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*'"

*Molina-Martinez*, 136 S. Ct. at 1345 (emphasis in original) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007), and *Peugh v. United States*, 133 S. Ct. 2072, 2083, 2087 (2013)).

From that understanding of the role of the Guidelines, the Supreme Court concluded that an error related to the Guidelines “can be particularly serious” and is presumptively prejudicial: “When a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant’s ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” *Molina-Martinez*, 136 S. Ct. at 1345. This Court’s recent en banc decision in *Tyrone Davis* reiterates the principle that the guidelines are the initial reference point that frames the sentencing judge’s discretion: “by statute, a sentencing judge’s discretion is always framed by the Guidelines.” *Tyrone Davis*, 2016 WL 3245043, at \*10.

Retroactive guideline amendments are directly analogous to the type of guideline error addressed in *Molina-Martinez* because, by retroactively lowering a particular guideline range, the Commission has determined that the sentencing court should use a lower range as its starting point and initial bench mark for imposing the ultimate sentence. The decision in *Molina-Martinez* confirms that defendants sentenced under the higher range probably received a higher sentence than they

would have if the lower range approved by the Commission had been applied. A sentencing scheme intended to avoid unwarranted disparity and permit individual flexibility cannot arbitrarily prohibit an entire category defendants from being considered for a full reduction without untethering the process from the overall statutory sentencing system.<sup>2</sup>

4. *Contrary To The Government's Position, § 991(b)(1)(B) Applies To "Sentencing Policies And Practices For The Federal Criminal Justice System," Which Includes Retroactive Sentence Reduction Proceedings.*

The second prong of the government's argument is that § 991(b)(1)(B), "by its own terms," or by its "plain meaning," applies only to original sentencings and not to retroactive sentence reduction proceedings under § 3582 (c). Resp. Br. at 16, 19. "[S]tatutory interpretation 'turns on the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The government points to no terms in § 991(b) that restrict the

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<sup>2</sup> As discussed, *Tercero* and *Davis* did not address the issues raised in this appeal. To the extent their reasoning is applicable to the question of whether the Commission can negate original variances and departures, that reasoning has been superseded by *Molina-Martinez*. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that a panel of this Court must follow the theory or reasoning underlying higher court authority).

provision to the original sentencing. To the contrary, § 991(b) broadly applies to “sentencing policies and practices for the Federal criminal justice system.”

If Congress intended § 991(b) to apply only to policies and practices governing the initial imposition of sentence, it would have said so. *See Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016) (“Congress ‘does not, one might say, hide elephants in mouseholes.’”) (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). Instead, Congress phrased § 991(b) broadly. Moreover, Congress made clear in a different statute that retroactive sentence reductions are an “aspect of sentencing or sentence implementation[.]” 28 U.S.C. § 994(a)(2)(C) (referencing sentence modification provisions including § 3582(c)). Thus, both sentence reduction proceedings and original sentencings are included within the broad “sentencing policies and practices for the Federal criminal justice system” that must satisfy the criteria in § 991(b).

**B. Section 1B1.10 Violates The Equal Protection Clause Because There Is No Rational Reason To Categorically Nullify Previously Granted Departures And Variances When Implementing A Retroactive Guideline Amendment.**

The government contends that the current version of § 1B1.10 meets rational basis review because (1) the rational basis standard requires only a tenuous connection between the Sentencing Commission’s action and some legitimate government interest, and (2) it is theoretically possible to posit “plausible” bases for

the distinction, thus ending any further inquiry by the courts. Resp. Br. at 22-28. This defense of the § 1B1.10 limitation fails because the rational basis standard, while deferential to government actions, is not as deferential as the government asserts, and the bases put forward by the government are too general and attenuated to support the specific action taken by the Commission.

Rational basis review is not “toothless.” *Matthews v. de Castro*, 429 U.S. 181, 185 (1976). The classification must be “narrow enough in scope and grounded in sufficient factual context ... to ascertain some relation between the classification and the purpose it serve[s].” *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (“[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained”); *see also Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590-91 (9th Cir. 2008) (challenging party can “rebut the facts underlying [the] asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose”). While the fit between the problem and the solution need not be perfect, it also cannot be “so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 446 (1985).

In order for a law to be legitimate, it must also further a legitimate state objective. Op. Br. at 34-36. One of the Commission's stated justifications for the new 2011 version of §1B1.10 was that it "promotes conformity with the new guideline range." Op. Br. at 34-36. To the extent this means disregarding the full sentencing process, this is not a legitimate objective. While the guidelines play a crucial role in sentencing as a starting point or benchmark – a role reiterated by *Molina-Martinez* – they nonetheless are just that: a starting point. Nothing in the Application Instructions warrants freezing the process before the required consideration of departures and variances under U.S.S.G. § 1B1.1(b) and (c). The mid-sentencing steps are not entitled to any more weight than any other factor in the ultimate § 3553(a) determination. Elevating an interim step in determining the ultimate Guidelines sentence as more important than other § 3553(a) factors is not a legitimate objective of the Commission and cannot serve as part of any rational basis.

The other justifications offered by the Commission are similarly unavailing. In the opening brief, the defendants argued that there was no factual basis for the Commission's claimed goals of "avoiding litigation," "avoiding undue complexity," and preventing "windfalls." Op. Br. at 37-40. In response, the government's brief complains that the defendants only cited "selected testimony" from the hearings, whereas considerably more evidence was before Commission when it adopted the

amendment. Resp. Br. at 27-28. But the government's brief points to no evidence or testimony in that large volume of material showing that windfalls were a legitimate problem. Instead, the government's brief argues that it is irrelevant whether windfalls actually existed or not. Resp. Br. at 28 n.4.

The government's argument misapplies the cited equal protection cases. It is quite true that the rational basis test does not require an evidentiary record; indeed, courts can speculate about what the rational basis may be and are not bound by what an agency may or may not have articulated as its basis. *See Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). The rational basis must nevertheless be grounded in fact and reality, and speculation about possible rational bases must be reasonable. *See Heller*, 509 U.S. at 320 (speculation, while permissible, must be "rational"); *Lazy Y Ranch*, 546 F.3d at 590-91; *Lewis v. Thompson*, 252 F.3d 567, 590 (2d Cir. 2001) (justification for the law may not rely on factual assumptions that exceed the bounds of rational speculation). The point of the discussion in the defendants' opening brief about the testimony before the Commission was not to complain that the Commission did not make a sufficient record to justify its action, but to establish that the supposed problems identified by the Commission as bases for the new rule – windfalls, too much litigation, undue complexity – did not, in the opinions of the stakeholders in the federal criminal justice system, exist at all.

The crux of the problem with § 1B.10, though, is the extreme disconnect between the scope of any purported problem and the Commission’s identified solution. Rational basis review invalidates a measure whose “sheer breadth” is “discontinuous with the reasons offered for it.” *Romer*, 517 U.S. at 632; *id.* at 635 (rejecting justifications where “[t]he breadth of the [measure] is so far removed from these particular justifications that we find it impossible to credit them”). The government’s proposed bases for the limitation in § 1B1.10 bear no rational relationship to its scope.

First, the government suggests that the limitation in § 1B1.10 makes sense because of a single scenario in which it serves to prevent unwarranted disparity – that is, when a defendant received a variance “because a judge believed that the drug guidelines were too harsh.” Resp. Br. at 23. However, judges already had discretion to deny reductions in those circumstances and were advised to do so. Op. Br. at 37-38. Commission statistics show that downward variances because of a judge’s disagreement with the guidelines were extremely rare. According to figures for fiscal year 2010 – the last year before the 2011 amendment to § 1B1.10 – when judges awarded downward variances, the judges cited their disagreement with the guideline range as one reason for a lower sentence less than 2% of the time. By contrast, judges cited personal factors of the defendant, combined with the nature and circumstances

of the individual case, in the overwhelming number of instances.<sup>3</sup> Such a rare scenario cannot logically support a categorical restriction against permitting judges to incorporate *all* variances *and* departures (except substantial assistance), in the myriad circumstances where the sentencing judge decided that a sentence below the guideline range was appropriate. For example, there is simply no reason why the beneficiaries of “encouraged” departures – such as diminished capacity and other imperfect defenses – should be disqualified from consideration for a sentence reduction. *See Koon v. United States*, 518 U.S. 81, 94-95, 101 (1996) (under mandatory guidelines, the Commission identified “encouraged” grounds for departure in U.S.S.G. § 5K2.10). The Commission’s answer need not be the “best” answer, but it must be rational. Here, the broad solution is not a rational fit for the narrow problem; to use the government’s analogy, no doctor could claim a rational basis to conduct surgery with a meat cleaver rather than a scalpel.

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<sup>3</sup> *See* United States Sentencing Commission, 2010 Sourcebook of Federal Sentencing Statistics, Tables 25, 25A, and 25B. Disagreement with the guideline range includes “Crack/powder disparity” (cited as a justification for a downward variance 1.1 % of the time) and “General guideline adequacy issues” (cited .7% of the time). The defendants cited testimony before the Sentencing Commission by both the defense bar and the Department of Justice that departures on the basis of disagreement with the guidelines were rare and were already being addressed. Op. Br. at 39-40.

Next, the government asserts that the change in § 1B1.10 is rational because it encourages cooperation. Resp. Br. at 24. As with the first proposed basis for the amendment, this one also fails because the prior version of § 1B1.10 already incentivized cooperation by allowing retroactive sentence reductions to those defendants who had originally secured a departure or variance. Any increased incentive secured by eliminating consideration for all variances and departures except those granted for substantial assistance is highly speculative and, given the complexity and dangers related to the decision to cooperate, unlikely to play any meaningful role in the information marketplace.

The government's brief criticizes the defense for identifying the "hypothetical circumstances in which the guideline scheme yields seemingly irrational results," and responds that a provision is not unconstitutional because it results in "some inequality." Resp. Br. at 22-25. That response does not correctly characterize the effect of this amendment, which institutionalizes disparity without rationally furthering a legitimate goal. In *Chapman v. United States*, cited by the government, the Supreme Court upheld rules that set sentences for LSD crimes based on the total weight of the drug, including carrier weight, instead of the weight of the pure drug alone. 500 U.S. 453, 465-66 (1991). The Court held that the rule was not arbitrary because it was intended to "punish severely large-volume drug traffickers at any

level.” *Id.* Further, the petitioners had not identified any circumstances in which the sentencing scheme had “actually produced an arbitrary array of sentences,” and the Court concluded that it would “do exactly what [it] was designed to do” in “the vast majority of cases.” *Id.* at 466.

The provision here serves to eliminate almost all justified deviations below the amended guideline range, contrary to Supreme Court precedent requiring the guidelines to play a “central role” in sentencing, with the ultimate sentence justified in relation to the guidelines. *See Molina-Martinez*, 136 S. Ct. at 1347 (“District courts, as a matter of course, use the Guidelines range to instruct them regarding the appropriate balance of the relevant federal sentencing factors.”); *Peugh*, 133 S. Ct. at 2083 (“sentencing decisions are anchored by the Guidelines,” and the Guidelines “remain a meaningful benchmark through the process of appellate review”). Unlike the scenario in *Chapman*, the government in this case has identified only two narrow circumstances in which the challenged rule achieves its intended goals, whereas the defendants have shown that, because of its breadth, the rule produces unfair and irrationally disparate sentence reduction eligibility in most cases.

The government has not distinguished three specific cases cited in the defendants’ opening brief in which this Court and the Fourth Circuit identified equal protection concerns with sentencing measures that irrationally awarded presentence

credits to serious offenders but not to less serious ones. Op. Br. at 25, 28, 30, 36 (citing *Jonah R. v. Carmona*, 446 F.3d 1000 (9th Cir. 2006); *Myers v. United States*, 446 F.2d 232 (9th Cir. 1971); *Dunn v. United States*, 376 F.2d 191 (4th Cir. 1967)). There is no principled difference between those cases and the present one. In both situations, the sentencing authorities created a scheme whereby sentences were made shorter for more serious or less deserving offenders while denying the same benefit to less serious or more deserving ones. See *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (because harsher treatment of aliens based on less serious prior convictions “makes scant sense,” agency rule was inconsistent with the immigration statutes).

The government’s response that sentence reductions are discretionary, so “an eligible but undeserving defendant will not be placed in a more advantageous position,” Resp. Br. at 24, is simply wrong. Eligibility for a sentence reduction is a more “advantageous” position than categorical ineligibility. *Cort v. Crabtree*, 113 F.3d 1081, 1085 (9th Cir. 1997) (“A prisoner’s right to *consideration* for early release is a valuable one that we have not hesitated to protect.”) (emphasis in original). The rational basis analysis requires the government to pursue its goals in a rational manner. Here, the fit between the problem is “so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne*, 473 U.S. at 446.

**C. The Retroactive Change In § 1B1.10 Violated Mr. Padilla-Diaz's and Mr. Heckman's Rights To Due Process Because It Disrupted Their Settled Expectation Of Eligibility To Seek The Benefit Of A Future Guideline Amendment.**

Mr. Padilla-Diaz and Mr. Heckman both pled guilty before the 2011 version of § 1B1.10 became effective. Their plea agreements allowed them to seek below-guideline sentences. Their plea agreements also contained broad waivers of the right to file appeals and post-conviction or habeas corpus proceedings, but specifically excepted motions under § 3582(c) in the event of retroactive guideline reductions.

Every version of § 1B1.10 that had ever existed before 2011, including the version applicable at the time these defendants entered their pleas, rendered defendants eligible for a retroactive reduction if their guideline range were lowered, regardless of whether they received below-guideline sentences originally. The enactment of the new § 1B1.10 in 2011 took away that benefit. Taking away this bargained-for benefit retroactively violates their right to due process. Op. Br. at 42-55.

The government first responds that this issue has already been ruled on in *United States v. Gasca*, 633 F. App'x 470 (9th Cir. 2016). Resp. Br. at 29 (asserting “This Court has recently rejected a similar claim”). Not so. *Gasca* is a two-paragraph unpublished decision in a pro se appeal that states only: “We reject *Gasca*'s argument that section 1B1.10(b), as revised by the Sentencing Commission in 2011, violates

his right to due process.” 633 F. App’x at 471. The opinion does not spell out what issue the defendant raised, nor does it discuss the due process retroactivity doctrine, the three-part *Carlton* test, *St. Cyr*, the significance of the plea agreement language, or any other issue raised in this appeal. *Gasca* sheds no light on any issue raised by these defendants.

The government also makes a cursory argument that use of the former version of U.S.S.G. § 1B1.10 would violate the “one book rule,” because the defendants would be seeking to apply the 2014 version of U.S.S.G. § 2D1.1 (the Drug Quantity Table) at the same time as the pre-2011 version of U.S.S.G. § 1B1.10. The one book rule does not apply to sentence reduction proceedings because § 1B1.10(b)(1) requires courts to determine the amended guideline range by substituting “only the [retroactive] amendments . . . for the corresponding guideline provisions that were applied when the defendant was sentenced” and leaving “all other guideline application decisions unaffected.” *See United States v. Trujillo*, 713 F.3d 1003, 1011 (9th Cir. 2013) (holding that a sentence reduction court must apply all parts of a relevant amendment, but should not apply aggravating provisions of other guideline amendments) (citing *United States v. Hamilton*, 67 F.3d 761, 764-65 (9th Cir. 1995)).

The government next asserts that the Supreme Court’s opinion in *Dillon* rejected the defendants’ due process claim by holding that defendants do not have a constitutional right to have their sentences reduced. Resp. Br. at 30-31. That holding has no bearing on the due process claim. While criminal defendants do not have a constitutional right to have their sentences reduced, they do have a right, when the government acts, for that action to conform to the Constitution. For example, in *Lynce v. Mathis*, a defendant accumulated “early release credits” under a Florida system that resulted in the defendant actually being released early. 519 U.S. 433 (1997). But the legislature passed another law that retroactively canceled the early release credits, and the defendant was rearrested to finish his term. The Court held that the retroactive elimination of these earned credits violated the ex post facto clause. *Id* at 441-49.

In so holding, the Court relied on *Weaver v. Graham*, 450 U.S. 24, 33-36 (1981), in which the Court held that retroactive cancellation of good behavior credits similarly violated the ex post facto clause. *Lynce*, 519 U.S. at 441-43. Neither case turned on any holding that the defendants had a constitutional right to early release or good behavior reductions. *See also Cort*, 113 F.3d at 1086 (citing *Landrgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (applying “settled expectations” test to retroactive denial of eligibility for discretionary sentence reduction).

The government's primary response is that the defendants did not have a sufficient "settled expectation" in a future sentence reduction to implicate due process. Resp. Br. at 31-34. This is also the basis on which the district court ruled against these defendants on this issue. ER-APD-3; ER-JH-3. The three-part test to determine when due process is violated by a new law made explicitly retroactive is set out in *United States v. Carlton*, 512 U.S. 26 (1994). Under *Carlton*, due process requires that (1) the statute be a rational means to accomplish a legitimate legislative purpose, (2) the period of retroactivity must be moderate and "confined to short and limited periods required by the practicalities of national legislation," and (3) the legislation must not impose severe consequences on the parties' interests in fair notice and repose. 512 U.S. at 31-32; *see also United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1052-53 (9th Cir. 2004) (Pregerson, J., concurring).<sup>4</sup>

Although defendants contested all three of these factors, each of which is required for the retrospective law to pass constitutional muster, the government's

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<sup>4</sup> Although *Carlton* establishes the framework for analyzing the due process concerns of explicitly retroactive legislation, and although the defense brief discusses the three-part *Carlton* test at great length (Op. Br. at 45-55), the government dismisses *Carlton* in a short sentence, asserting that *Carlton* is "entirely irrelevant because it involved a Due Process challenge (rejected) to a retroactively applicable federal estate tax." Resp. Br. at 33-34. The subject matter does not make *Carlton* irrelevant to retroactivity analysis. In fact, its protective principles should be stronger in the context of human freedom than when solely financial interests are at stake.

response focuses only on the third prong. *Compare* Op. Br. at 47-53 *with* Resp. Br. at 31-34. The government contends that the defendants could not have had a settled expectation because “reliance upon anticipated future guideline changes is not objectively reasonable.” Resp. Br. at 34. However, in the 20 years between November 1, 1989, and January 2010, when Mr. Padilla-Diaz pled guilty (Mr. Heckman pled guilty a year later in February 2011), the sentencing guidelines had been retroactively amended 28 times. U.S.S.G. § 1B1.10 (c). The most recent of those had been the crack cocaine reduction in May 2008. U.S.S.G. amends. 715, 716. The prospect of a retroactive sentencing guideline reduction that would lower the sentences of these defendants was not unrealistic or farfetched; indeed, as it turned out, such a reduction was actually enacted.

Regardless of whether this history supported a reasonable expectation that these defendants’ guideline ranges would be lowered, the defendants reasonably expected § 1B1.10 to support their eligibility for a reduction in the event such an amendment occurred. The history of § 1B1.10 was that every version of it, through multiple previous amendments, allowed defendants to receive the benefit of retroactive amendments regardless of whether they received below-guideline sentences at their original sentencing hearings.

Indeed, the defendants' expectation of benefiting from a future guideline amendment that reduced their guideline range was a bargained-for consideration in their plea agreements. The single most important consideration for most criminal defendants in deciding whether to plead guilty is the length of the likely sentence. It ignores reality to contend that the prospect of future reductions is absent from that consideration. The government's brief argues that the defendants bargained for something less:

An examination of defendants' plea agreements reveals that the only settled expectations defendants had were that they did not waive their rights to file motions based on retroactive changes to the applicable guidelines. Defendants have filed such motions, and the government has not argued that the motions are foreclosed under the plea agreement, satisfying the only reasonable expectation they could have.

Resp. Br. at 34. The fallacy of this argument is its inherent assumption that the defendants' expectations were shaped only by the plea agreement, and not by the law in effect when the plea agreement was written. Under the law at the time, and as it had always previously existed, the defendants were eligible for retroactive sentence reductions without consideration to whether they had received downward departures or variances. What they bargained for in their plea agreements was an exception to the finality rule so that they could seek a retroactive reduction if one occurred. The plea agreement did not promise that a future retroactive guideline amendment would occur, but the agreement shows that the ability to seek a

retroactive reduction was part of the defendants' thought process in deciding whether to accept the plea offer. They had a "settled expectation" because the hope of a sentence reduction was part of what they relied on in deciding to plead guilty.

*INS v. St. Cyr* does not require that there be any particular degree of certainty about some future benefit to establish a "settled expectation." 533 U.S. 289 (2001). *St. Cyr* only requires that eligibility for such a benefit be something the defendant relied on in deciding whether to engage in the "quid pro quo" of a guilty plea:

IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly "attaches a new disability, in respect to transactions or considerations already past."

*St. Cyr*, 533 U.S. at 321-322 (citations omitted). *St. Cyr* also discusses the likelihood of a § 212(c) waiver being granted, but it does so only as a way of establishing the likelihood that a noncitizen defendant would take eligibility for § 212(c) into account when deciding whether to plead guilty:

Prior to AEDPA and IIRIRA, aliens like *St. Cyr* had a significant likelihood of receiving § 212(c) relief. Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect.

*St. Cyr*, 533 U.S. at 325. The two cases cited by the government in its brief are in accord. See *Alocozy v. U.S. Citizenship and Immigration Services*, 704 F.3d 795, 799

(9th Cir. 2012) (“[W]e are convinced that a person in Alocozy’s situation could not have had any ‘settled’ or even reasonable belief or expectation that a plea to a serious felony would not impair any future attempt to pursue naturalization as a United States citizen”); *United States v. Gonzalez*, 429 F.3d 1252, 1257 (9th Cir. 2005) (“[U]nlike in *St. Cyr*, there is no indication that, as a matter of common practice, aliens have chosen to forego their constitutional right to trial in reliance on maintaining their eligibility for § 212(h) relief by pleading guilty and thus ensuring a particular sentence.”).

In the present cases, it is unnecessary to assess whether eligibility for a possible future reduction was something the defendants would *likely*, or “as a matter of common practice,” have taken into account because the language of the plea agreement makes it explicit that they actually *did* take it into account. In such a situation, their expectations must be honored:

The potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like Jideonwo and St. Cyr is significant and manifest. Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in Jideonwo’s and St. Cyr’s position agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens’ belief in their continued eligibility for § 212(c) relief, it would surely be contrary to “familiar considerations of fair notice, reasonable reliance, and settled expectations,” . . . to hold that IIRIRA’s subsequent restrictions deprive them of any possibility of such relief.

*St. Cyr*, 533 U.S. at 323-24 (citations and footnotes omitted). The same is true here. Based on the language of the plea agreement, the defendants unambiguously and unquestionably relied on the possibility of future relief as part of their decision to plead guilty, meaning that retroactive elimination of that possibility violates the third of the *Carlton* factors.

## **Conclusion**

The Sentencing Commission was given an explicit instruction in § 991(b) that its actions with regard to sentencing policies and practices in the federal criminal justice system must avoid unwarranted sentencing disparity and provide sufficient flexibility to permit individualized sentencing decisions. The enactment of the 2011 version of § 1B1.10 violated that instruction. The distinction drawn by that section, discriminating against more deserving defendants while rewarding less deserving ones, has no basis in rationality and improperly deprives defendants who pled guilty in reliance on previous law the benefit of what they bargained for. The Court should reverse the district courts' findings that they lacked jurisdiction and remand for the

courts to exercise discretion under § 3582(c) to reduce the defendants' sentences under Amendment 782.

Respectfully submitted this the 11th day of July, 2015.

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

|                                  |   |                                    |
|----------------------------------|---|------------------------------------|
| <b>UNITED STATES OF AMERICA,</b> | ) |                                    |
|                                  | ) |                                    |
| <b>Plaintiff-Appellee,</b>       | ) | <b>CA Nos. 15-30279, 15-30294,</b> |
|                                  | ) | <b>15-30375, 15-30376</b>          |
| <b>v.</b>                        | ) |                                    |
|                                  | ) |                                    |
| <b>ARMANDO PADILLA-DIAZ,</b>     | ) |                                    |
| <b>JEFFREY HECKMAN JR.,</b>      | ) |                                    |
| <b>BERNARO CONTRERAS GUZMAN,</b> | ) |                                    |
| <b>and JOSE MORALES,</b>         | ) |                                    |
|                                  | ) |                                    |
| <b>Defendant-Appellant.</b>      | ) |                                    |

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**CERTIFICATE OF COMPLIANCE**

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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 6,995 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 font.

Dated this 11th day of July, 2016.

/s/ *Bryan E. Lessley*

Bryan E. Lessley

Attorney for Defendants/Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on July 11, 2016, I electronically filed the foregoing Reply Brief of Appellants 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