No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOSE HERNANDEZ-MARTINEZ, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME 2

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INDEX TO APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

VICTOR ANTONIO CERVANTES,
aka ROBERTO CERVANTES ESTEVA,

Defendant.

Case No. 6:12-cr-00400-AA

OPINION AND ORDER

AIKEN, Chief Judge:

Defendant seeks a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782 of the United States Sentencing Guidelines (USSG). Defendant's motion is denied.

DISCUSSION

On September 6, 2012, defendant was convicted of possession with intent to distribute five grams or more of methamphetamine. Under the USSG, his total offense level was 29 (after credit for

acceptance of responsibility) and his criminal history category was III, resulting in a guideline sentencing range of 108 to 135 months. However, the court granted defendant's request for a sentence outside the advisory guideline range and imposed a sentence of 72 months; this sentence corresponds with an offense level of 24 or 25.

Amendment 782 reduces most base offense levels on the § 2D1.1 Drug Quantity Table by two levels, and Amendment 788 authorized retroactive application of Amendment 782. Application of Amendment 782 reduces defendant's total offense level from 29 to 27, with an amended guideline range of 87-108 months. Defendant argues that he is eligible for an additional four-level reduction to account for the downward variance the court allowed at sentencing. With an additional four-level reduction, defendant's offense level would be 23 and the guideline sentencing range would be 57-71 months. Defendant requests a sentence of 60 months, the statutory minimum sentence.

The government opposes defendant's motion, because his 72-month original sentence is already below the amended guideline range of 87-108 months. Under USSG § 1B1.10(b)(2)(A), "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." USSG § 1B1.10(b)(2)(A);

see also id. at n. 3. Under 18 U.S.C. § 3582(c)(2), a reduction in sentence is permitted only when "such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." See also Dillon v. United States, 560 U.S. 817, 821 (2010) ("Any reduction must be consistent with applicable policy statements issued by the Sentencing Commission."). Thus, defendant's request is inconsistent with USSG § 1B1.10(b)(2), and the court lacks the authority to grant the reduction in sentence sought by defendant. See United States v. Parker, 617 Fed. Appx. 806, 807 (9th Cir. Sept. 25, 2015) ("The district court properly concluded that Parker is ineligible for a sentence reduction because her sentence is already below the amended Guidelines range, and the government did not file a motion for substantial assistance.")[1]; United States v. Munguia-Diaz, 606 Fed. Appx. 385, 386 (9th Cir. June 30, 2015) ("Because Munguia-Diaz's 144-month sentence is lower than the bottom of the new sentencing range, he is not eligible for a reduction" under Amendment 782).

Defendant nevertheless argues that § 1B1.10(b)(2) violates the Equal Protection Clause by denying defendants who received downward variances from obtaining the benefit of Amendment 782, thus treating them differently from defendants who did not receive downward variances. Defendant argues that no rational basis supports this distinction, as the Sentencing Commission is

[1] Defendant's request does not does not fall under the substantial assistance exception. USSG § 1B1.10(b)(2)(B).

essentially allowing "more dangerous and less deserving" offenders to gain the "full" benefit of Amendment 782. Def.'s Am. Mot. 6 (doc. 33). I disagree.

Defendant's argument rests on two presumptions, neither of which is accurate or supported by the record. First, defendant assumes that all other defendants who did not receive downward variances at their original sentencing hearings are "more dangerous" than defendants who did. However, defendant presents no evidence or data to support this rather broad assertion; indeed, many factors may influence a judge's decision to impose a downward variance, including the circumstances and seriousness of the offense, adequate deterrence, and the need for education training, medical care, or other treatment. See 18 U.S.C. § 3553(a). Second, defendant's argument and ultimate request for a 60-month sentence assumes that the court would have granted the exact same level of downward variance had defendant's total offense level been 27 instead of 29 at sentencing, an assumption that is not necessarily accurate.

Regardless, however, defendant's Equal Protection argument fails for the simple reason that a rational basis exists to support the policy articulated in § 1B1.10(b)(2)(A). See United States v. Navarro, 800 F.3d 1104, 1113 (9th Cir. 2015) ("When the Commission enacts Guidelines treating one class of offenders differently from another, equal protection generally requires that the

classification be "rationally related to a legitimate government interest.").[2] Here, the reasons underlying § 1B1.10(b)(2)(A) - avoiding undue litigation and complexity, promoting uniformity in sentencing, and preventing an unintended windfall to defendants - survives rational basis scrutiny. United States v. Davis, 739 F.3d 1222, 1226 (9th Cir. 2014) (explaining reasons underlying § 1B1.10(b)(2)(A) when upholding the Sentencing Commission's authority to implement it). I find nothing unconstitutional about the Sentencing Commission's policy, particularly in this case where defendant's 72-month term of imprisonment remains well below the amended guideline range of 87-108 months.

Accordingly, defendant's amended motion for reduction of sentence (doc. 33) is DENIED.

IT IS SO ORDERED.

Dated this 11th day of December, 2015.

Ann Aiken
United States District Judge

[2]I find that the appropriate level of scrutiny is rational basis; defendant does not have a fundamental right to a lower sentence in this circumstance and he does not identify a suspect classification. Dillon, 560 U.S. at 828; United States v. Johnson, 626 F.3d 1085, 1088 (9th Cir. 2010) (applying rational basis standard "to equal protection challenges to the Sentencing Guidelines based on a comparison of allegedly disparate sentences").

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA

v.

No. 3:12-cr-00442-MO
ORDER

OBDULIO ALVARADO-PONCE,

Defendant.

MOSMAN, J.,

Defendant is ineligible for a reduction in sentence under Amendment 782 because he was originally sentenced below the amended advisory Guideline range. Therefore, Defendant's Motion to Reduce Sentence [66] is DENIED.

DATED this 21st day of December, 2015.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

1 – ORDER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	Case No. 3:12-cr-0660-SI
v.	**ORDER**
OMAR PEREZ-MEDINA,	
Defendant.	

Billy J. Williams, Interim United States Attorney, Kemp L. Strickland, Assistant United States Attorney, United States Attorney's Office for the District of Oregon, 405 East 8th Avenue, Suite 2400, Eugene, OR 97401. Of Attorneys for the United States.

Stephen R. Sady, Chief Deputy Defender, and Bryan E. Lessley, Assistant Federal Public Defender, Federal Public Defender's Office, 859 Willamette Street, Eugene, OR 97401. Of Attorneys for Defendant.

Michael H. Simon, District Judge.

Defendant Omar Perez-Medina filed a motion under 18 U.S.C. § 3582(c)(2) seeking a two-level reduction of his sentence based on United States Sentencing Guidelines Amendment 782. The United States opposes this motion, arguing that Defendant is ineligible for a sentence reduction under Amendment 782 because Defendant's original sentence is lower than his amended guideline range and thus under the Sentencing Commission's policy statement U.S.S.G. § 1B1.10, Defendant is not eligible for a reduction. Defendant argues that the provisions of this policy statement contradict one another, are contrary to the Sentencing

Commission's statutory directive, and violate the United States Constitution. Defendant further argues that under the doctrine of constitutional avoidance, the Court should interpret § 1B1.10 in a manner consistent with Defendant's interpretation.

This case raises identical arguments to those raised in three cases previously decided by this Court; *United States v. Jose Carranza Gonzalez*, Case No. 12-cr-0154-SI, *United States v. Bernardo Contreras Guzman*, Case No. 12-cr-0291-SI, and *United States v. Gorbatenko*, Case No. 10-cr-0396-SI.[1] The Court heard consolidated oral argument in those cases on November 20, 2015, and issued detailed opinions in those cases on December 2, 2015. This case involves the same underlying factual situation in that Mr. Perez-Medina received an original sentence that is below his amended guideline range under Amendment 782. In calculating Mr. Perez-Medina's original sentence, he was subject to an advisory guideline range of 135-168 months. After receiving a significant downward variance, he was sentenced to 78 months. Taking Amendment 782 into account, Mr. Perez-Medina's amended guideline range is 108-135 months, well above his sentence of 78 months.

CONCLUSION

For the reasons explained in the Court's December 2, 2015 Opinion and Orders issued in *Gonzalez*, *Guzman*, and *Gorbatenko*, Mr. Perez-Medina' motion (Dkt. 21) to reduce his sentence under 18 U.S.C. § 3582(c)(2) is DENIED.

IT IS SO ORDERED.

DATED this 29th day of December, 2015.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

[1] Mr. Perez-Medina acknowledges that his arguments are the same as those raised in *Gonzalez*, *Guzman*, and *Gorbatenko* and that the Court previously rejected those arguments.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES,	**3:11-CR-00412-BR**
Plaintiff,	**AMENDED OPINION AND ORDER**
v.	
JULIAN ALARCON CASTANEDA,	
Defendant.	

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BROWN, Judge.

This matter comes before the Court on Defendant Julian Alarcon Castaneda's Motion (#154) for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c) and U.S.S.G. Amendment 782. For the reasons that follow, the Court **DENIES** Defendant's Motion but **GRANTS** a certificate of appealability.

BACKGROUND

On October 13, 2011, Defendant Julian Alarcon Castaneda was charged in an Indictment with one count of Conspiracy to Possess with Intent to Distribute Heroin and Cocaine, one count of Possession with Intent to Distribute Heroin, seven counts of Possession of a Firearm for Drug Trafficking, and one count of Possession of Firearms by an Illegal Alien.

On January 8, 2013, Defendant entered into a Plea Agreement in which he pled guilty to Conspiring to Distribute Heroin in violation of 21 U.S.C. §§ 841 and 846. In the Plea Agreement Defendant and the government agreed to a base offense level of 34 under the then-existing Drug Quantity Table set out in United States Sentencing Guidelines (U.S.S.G.) § 2D1.1(c). The parties agreed to an upward adjustment of two levels because of the presence of a firearm and an additional upward adjustment of two levels because Defendant was an organizer or leader. The parties also agreed to recommend a three-level downward adjustment under U.S.S.G. § 3E1.1 for acceptance of responsibility for a total offense level of 35. In light of "all considerations of this agreement," the parties agreed to a sentence of 121 months.

The May 6, 2013, Presentence Report (PSR) recommended a base offense level of 34 plus a two-level enhancement for possession of a dangerous weapon and a two-level enhancement for Defendant's leadership role for an adjusted offense level of 38. The PSR also recommended a two-level reduction for acceptance of responsibility and an additional one-level reduction for assisting authorities in the investigation or prosecution of Defendant's misconduct for a total offense level of 35. At Criminal History Category II, the advisory guideline range was 188-235 months.

On August 6, 2013, the Court, consistent with the parties'

recommendations, varied Defendant's sentence downward from the 188-235 range and sentenced Defendant to 121 months imprisonment.

Effective November 1, 2014, the United States Sentencing Commission adopted Amendment 782, which modified U.S.S.G. § 2D1.1 to lower the sentencing range for certain categories of drug-related offenses. The Sentencing Commission also adopted Amendment 788 effective November 1, 2014, which authorized retroactive application of Amendment 782 to defendants sentenced before its effective date.

On May 4, 2015, Defendant filed a Motion to Reduce Sentence based on Amendment 782. The Court heard oral argument on Defendant's Motion on December 22, 2015, and took the matter under advisement that day.

DISCUSSION

Pursuant to Amendment 782 Defendant seeks a reduction in his sentence to 120 months.[1] The parties do not dispute Defendant's advisory guideline range under Amendment 782 would be 151-188 months or that the 121-month sentence Defendant originally received is below that amended range. The government, however, asserts any further reduction of Defendant's sentence would

[1] Defendant concedes the maximum possible reduction of sentence to which Defendant could be entitled is one month because his conviction is subject to a ten-year mandatory minimum sentence.

violate the policy set out in U.S.S.G. § 1B1.10(b)(2)(A) and would exceed the Court's authority to modify a sentence under 18 U.S.C. § 3582(c)

Defendant, in turn, argues he is entitled to a further one-month reduction in his sentence notwithstanding § 1B1.10(b)(2)(A) because application of § 1B1.10(b)(2)(A) to his sentence would (1) create an "irreconcilable conflict" with 8 U.S.C. § 991, the implementing regulation and (2) violate the Equal Protection Clause. Defendant also asserts the doctrine of constitutional avoidance requires the Court to interpret § 1B1.10 to avoid constitutional concerns.

I. Sentence Modification Authority

"A federal court generally 'may not modify a term of imprisonment once it has been imposed.'" *Dillon v. United States*, 560 U.S. 817, 819 (2010)(quoting 18 U.S.C. § 3582(c)). "Congress has provided an exception to that rule '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.'" *Dillon*, 560 U.S. at 819 (quoting § 3582(c)(2)).

As noted, effective November 1, 2014, the Sentencing Commission modified § 2D1.1 to lower the sentencing range for certain categories of drug-related offenses, and the Commission authorized retroactive application of Amendment 782 to defendants

sentenced before its effective date.

When the Sentencing Commission lowers a sentencing range as it did with Amendment 782, 18 U.S.C. § 3582(c)(2) authorizes a court to reduce a defendant's term of imprisonment only after the court finds such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. The court must then determine whether the sentence should be reduced based on factors set out in 18 U.S.C. § 3553(a). *Dillon*, 560 U.S. at 826.

The Sentencing Commission policy statement at issue here is U.S.S.G. § 1B1.10, which provides in pertinent part:

> (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 . . . had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
> >
> > (2) Limitation and Prohibition on Extent of Reduction.--
> >
> > > (A) Limitation.-- . . . the court shall not reduce the defendant's term of imprisonment . . . 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.

Emphasis added. Application Note 1(A) explains in pertinent part:

> 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: . . . (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.

II. Departures and variances are not "guideline application decisions" and are not included in the "amended guideline range."

As noted, when the court considers a sentence modification pursuant to a retroactive change in the Sentencing Guidelines, § 1B1.10(b)(1) provides the changed provision is incorporated and "all other guideline application decisions" must remain

unaffected. Although Defendant does not explicitly raise the issue, Defendant implicitly asserts variances and departures are "guideline application decisions" that must remain unaffected. According to Defendant, therefore, variances and noncooperation departures should be included in calculating the "amended guideline range."

For the reasons stated on the record at oral argument and set out by Judge Michael Simon in *United States v. Gorgatenko*, 3:10-CR-00396-SI, the Court concludes the terms "guideline application decision" and "amended guideline range" are not ambiguous with respect to the inclusion of departures and variances when the Court considers the text of § 1B1.10, its application notes, the text of the previous version of § 1B1.10, and applicable case law. Considering these sources together, the Court concludes § 1B1.10 unambiguously does not include departures and variances in the amended guideline range.

III. Application of § 1B1.10(b)(2)(A) does not violate the implementing regulation.

Defendant asserts application of § 1B1.10(b)(2)(A) under the circumstances of his case would create an "irreconcilable conflict" with 28 U.S.C. § 991(b), the implementing regulation, if the Court concludes § 1B1.10 does not include departures and variances. Specifically, § 991(b) mandates in pertinent part that one of the purposes of the United States Sentencing Commission is to avoid "unwarranted sentencing disparities among

defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Defendant asserts an interpretation of § 1B1.10 that permits courts to grant sentence reductions to people who did not receive variances and noncooperation departures and requires courts to deny reductions to people who received such variances and departures would nullify the sentencing determinations previously made by the sentencing court and create unwarranted disparities.

For the reasons set out by the Court at oral argument; explained by Judge Simon in *Gorgatenko*; and further explained by the court in *United States v. Rodriguez*, No. 12cr1121-LAB, 2015 WL 4235363 (S.D. Cal. July 8, 2015), this Court concludes the limitation in § 1B1.10(b)(2)(A) that precludes consideration of variances and noncooperation departures in the context of a sentence modification under 18 U.S.C. § 3582(c) does not conflict with 18 U.S.C. § 991(b).

IV. Application of § 1B1.10(b)(2)(A) does not violate the Equal Protection Clause.

To the extent that the Court concludes § 1B1.10(b)(2) prohibits courts from reducing sentences based on previously-imposed variances and noncooperation departures, Defendant also asserts application of § 1B1.10(b)(2)(A) to Defendant's case violates his right to equal protection.

A. The rational-basis test applies.

"'The liberty protected by the Fifth Amendment's Due

Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.'" *Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015)(quoting *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013)).

Defendant, however, does not assert he is a member of a suspect class. In addition, Defendant cannot establish he is being deprived of a fundamental right because a defendant does not have a constitutional right to a sentence reduction based on subsequent guideline amendments. *See Dillon*, 560 U.S. at 827-28 (§ 3582 is a "narrow exception to the rule of finality," and sentencing modification proceedings under that statute "are not constitutionally compelled."). The Court, therefore, concludes Defendant's equal-protection challenge to § 1B1.10(b) is subject to a rational-basis review. *See, e.g., 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.").

Under rational-basis review the challenged classification "must be upheld against equal protection challenge 'if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.'" *United States v. Ellsworth*, 456 F.3d 1146, 1150 (9th Cir. 2006)(quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)(emphasis in

Ellsworth)). "A classification . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* (quotations omitted).

B. Analysis

For the reasons set out by the Court at oral argument and for the reasons set out by Judge Simon in *Gorgatenko;* Judge Owen Panner in *United States v. Garcia-Uribe,* 08-CR-30039-PA; Judge Michael Mosman in *United States v. Heckman*, 10-CR-143-MO, and *United States v. Padilla-Diaz*, 08-CR-126-MO; and Chief Judge Ann Aiken in *United States v. Mahan*, 06-CR-60045-AA, the Court concludes the government has established there is a rational relationship between the disparity of treatment of defendants in § 1B1.10 and a legitimate governmental purpose. Specifically, the Sentencing Commission found the distinction between departures and variances was "'difficult to apply' and 'prompted litigation.'" *United States v. Gonzalez*, No. 10CR1009- LAB 2015 WL 4760286, at *1 n.1 (S.D. Cal. Aug. 11, 2015)(quoting Notice of Final Action Regarding Amendment to Policy Statement 181.10, 76 Fed. Reg. 41332, 41332, 41334 (July 13, 2011)). 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." *Davis*, 739 F.3d at 1225. Defendant has not negated "every conceivable basis which might support" the Commission's decision prohibiting reductions below the amended guidelines range except in the case of substantial assistance nor has Defendant established there is not "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Ellsworth*, 456 F.3d at 1150. As the Supreme Court has noted "'equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' [When] rational basis review applies and 'there are plausible reasons for Congress' action, our inquiry is at an end.'" *Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015)(quoting *FCC*, 508 U.S. at 313-14).

Accordingly, the Court concludes application of § 1B1.10(b)(2)(A) to Defendant does not violate his right to equal protection.

V. Constitutional Avoidance

Finally, Defendant asserts the Court does not need to resolve Defendant's equal-protection challenge if it instead applies the doctrine of constitutional avoidance. Defendant asserts he has raised "serious questions" regarding the

constitutionality of interpreting § 1B1.10 to prohibit consideration of variances and noncooperation departures and contends the Court should interpret the policy statement so as to avoid these constitutional questions. Specifically, Defendant asserts under the doctrine of constitutional avoidance the Court should interpret "amended guidelines range" to include previously-imposed variances and departures. The Court, however, has not found a constitutional violation and does not find under rational-basis review that there are serious questions regarding the constitutionality of § 1B1.10 as to it prohibiting consideration of variances and noncooperation departures. The Court, therefore, declines to apply the doctrine of constitutional avoidance.

In summary, on this record the Court denies Defendant's Motion for Reduction of Sentence.

VI. Certificate of Appealability

Because the legal issues raised in Defendant's Motion are not clearly established and because Defendant's arguments have a possibility for reasonable disagreement, the Court grants Defendant a certificate of appealability.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#154) for Reduction of Sentence Pursuant to 18 U.S.C.

§ 3582(c) and U.S.S.G. Amendment 782 and **GRANTS** Defendant a certificate of appealability.

IT IS SO ORDERED.

DATED this 5th day of February, 2016.

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES,	3:10-CR-00311-BR
Plaintiff,	AMENDED OPINION AND ORDER
v.	
SERGIO AGUILAR-SAHAGUN,	
Defendant.	

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Attorneys for Defendant

BROWN, Judge.

This matter comes before the Court on Defendant Sergio Aguilar-Sahagun's Petition (#42) for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c) and Amendment 782 of the United States Sentencing Guidelines (U.S.S.G.). For the reasons that follow, the Court **DENIES** Defendant's Motion but **GRANTS** Defendant a certificate of appealability.

BACKGROUND

On July 19, 2010, Defendant Sergio Aguilar-Sahagun was charged in an Indictment with one count of Conspiracy to Possess with Intent to Distribute Heroin, one count of Possession with Intent to Distribute Heroin, and one count of Illegal Reentry.

On February 3, 2011, Defendant entered into a Plea Agreement

in which he pled guilty to Conspiring to Distribute Heroin and Illegal Reentry. In the Plea Agreement Defendant and the government agreed to a Base Offense Level of 32 under the then-existing Drug Quantity Table set out in United States Sentencing Guidelines (U.S.S.G.) § 2D1.1(c). The parties agreed to an upward adjustment of two levels for Defendant's "aggravating role." The parties also agreed to recommend a three-level downward adjustment for acceptance of responsibility for a Total Offense Level of 33. The parties agreed to recommend the mandatory-minimum sentence of 120 months.

The May 6, 2013, Presentence Report (PSR) recommended a Base Offense Level of 34 plus a two-level enhancement for Defendant's aggravating role and three-level reduction for acceptance of responsibility for a Total Offense Level of 33. At Criminal History Category II, the advisory guideline range was 151-188 months.

On May 5, 2011, the Court varied Defendant's sentence downward from the 151-188 range and sentenced Defendant to a 121-month term of imprisonment.

Effective November 1, 2014, the United States Sentencing Commission adopted Amendment 782, which modified U.S.S.G. § 2D1.1 to lower the sentencing range for certain categories of drug-related offenses. The Sentencing Commission also adopted Amendment 788 effective November 1, 2014, which authorized

retroactive application of Amendment 782 to defendants who were sentenced before its effective date.

On January 12, 2015, Defendant filed a Motion to Reduce Sentence based on Amendment 782. The Court took the matter under advisement on January 13, 2016.

DISCUSSION

Pursuant to Amendment 782 Defendant seeks a reduction in his sentence to 120 months.[1] The parties do not dispute Defendant's advisory guideline range under Amendment 782 would be 121-151 months or that the 121-month sentence that Defendant originally received is at the bottom of the amended range. The government, however, asserts the 121-month sentence that Defendant received is the same as the sentence he would receive under the amended guideline range, any further reduction of Defendant's sentence would violate the policy set out in U.S.S.G. § 1B1.10(b)(2)(A), and such a reduction would exceed the Court's authority to modify a sentence under 18 U.S.C. § 3582(c)

Defendant, in turn, argues he is entitled to a further one-month reduction in his sentence notwithstanding § 1B1.10(b)(2)(A) because application of § 1B1.10(b)(2)(A) to his sentence would

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[1] Defendant concedes the maximum possible reduction of sentence to which Defendant could be entitled is one month because his conviction is subject to a ten-year mandatory minimum sentence.

(1) create an "irreconcilable conflict" with 8 U.S.C. § 991, the implementing regulation and (2) violate the Equal Protection Clause. Defendant also asserts the doctrine of constitutional avoidance requires the Court to interpret § 1B1.10 to avoid constitutional concerns.

I. Sentence Modification Authority.

"A federal court generally 'may not modify a term of imprisonment once it has been imposed.'" *Dillon v. United States*, 560 U.S. 817, 819 (2010)(quoting 18 U.S.C. § 3582(c)). "Congress has provided an exception to that rule '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.'" *Dillon*, 560 U.S. at 819 (quoting § 3582(c)(2)).

As noted, effective November 1, 2014, the Sentencing Commission modified § 2D1.1 to lower the sentencing range for certain categories of drug-related offenses, and the Commission authorized retroactive application of Amendment 782 to defendants who were sentenced before its effective date.

When the Sentencing Commission lowers a sentencing range as it did with Amendment 782, 18 U.S.C. § 3582(c)(2) authorizes a court to reduce a defendant's term of imprisonment only after the court finds such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. The court must

then determine whether the sentence should be reduced based on factors set out in 18 U.S.C. § 3553(a). *Dillon*, 560 U.S. at 826.

The Sentencing Commission policy statement at issue here is U.S.S.G. § 1B1.10, which provides in pertinent part:

> (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 . . . had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
> >
> > (2) Limitation and Prohibition on Extent of Reduction.--
> >
> > > (A) Limitation.-- . . . the court shall not reduce the defendant's term of imprisonment . . . 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.

Emphasis added. Application Note 1(A) explains in pertinent part:

> 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: . . . (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.

II. Departures and variances are not "guideline application decisions" and are not included in the "amended guideline range."

As noted, when the court considers a sentence modification pursuant to a retroactive change in the Sentencing Guidelines, § 1B1.10(b)(1) provides the changed provision is incorporated and "all other guideline application decisions" must remain unaffected. Defendant asserts variances and departures are "guideline application decisions" that must remain unaffected. According to Defendant, therefore, variances and noncooperation departures should be included in calculating the "amended guideline range."

For the reasons the Court set out in *United States v.*

Castaneda, 3:11-CR-412-BR, and Judge Michael Simon set out in *United States v. Gorgatenko*, 3:10-CR-00396-SI, the Court concludes the terms "guideline application decision" and "amended guideline range" are not ambiguous with respect to the inclusion of departures and variances when the Court considers the text of § 1B1.10, its application notes, the text of the previous version of § 1B1.10, and applicable case law. Considering these sources together, the Court concludes § 1B1.10 unambiguously does not include departures and variances in the amended guideline range.

III. Application of § 1B1.10(b)(2)(A) does not violate the implementing regulation.

Defendant asserts application of § 1B1.10(b)(2)(A) under the circumstances of his case would create an "irreconcilable conflict" with 28 U.S.C. § 991(b), the implementing regulation, if the Court concludes § 1B1.10 does not include departures and variances. Specifically, § 991(b) mandates in pertinent part that one of the purposes of the United States Sentencing Commission is to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Defendant asserts an interpretation of § 1B1.10 that permits courts to grant sentence reductions to people who did not receive variances and noncooperation departures and requires courts to deny reductions to people who received such variances and departures would nullify the sentencing determinations previously made by

the sentencing court and create unwarranted disparities.

For the reasons the Court set out in *Castaneda;* explained by Judge Simon in *Gorgatenko;* and also explained by the court in *United States v. Rodriguez*, No. 12cr1121-LAB, 2015 WL 4235363 (S.D. Cal. July 8, 2015), this Court concludes the limitation in § 1B1.10(b)(2)(A) that precludes consideration of variances and noncooperation departures in the context of a sentence modification under 18 U.S.C. § 3582(c) does not conflict with 18 U.S.C. § 991(b).

IV. Application of § 1B1.10(b)(2)(A) does not violate the Equal Protection Clause.

To the extent that the Court concludes § 1B1.10(b)(2) prohibits courts from reducing sentences based on previously-imposed variances and noncooperation departures, Defendant also asserts application of § 1B1.10(b)(2)(A) to Defendant's case violates his right to equal protection.

A. The rational-basis test applies.

"'The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.'" *Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015)(quoting *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013)).

Defendant, however, does not assert he is a member of a suspect class. In addition, Defendant cannot establish he is

being deprived of a fundamental right because a defendant does not have a constitutional right to a sentence reduction based on subsequent guideline amendments. *See Dillon*, 560 U.S. at 827-28 (§ 3582 is a "narrow exception to the rule of finality," and sentencing modification proceedings under that statute "are not constitutionally compelled."). The Court, therefore, concludes Defendant's equal-protection challenge to § 1B1.10(b) is subject to a rational-basis review. *See, e.g., 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.").

Under rational-basis review the challenged classification "must be upheld against equal protection challenge 'if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.'" *United States v. Ellsworth*, 456 F.3d 1146, 1150 (9th Cir. 2006)(quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)(emphasis in *Ellsworth*)). "A classification . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which

might support it." *Id.* (quotations omitted).

B. Analysis.

For the reasons the Court set out in *Castaneda* and for the reasons set out by Judge Simon in *Gorgatenko;* Judge Owen Panner in *United States* v. *Garcia-Uribe,* 08-CR-30039-PA; Judge Michael Mosman in *United States v. Heckman,* 10-CR-143-MO, and *United States* v. *Padilla-Diaz,* 08-CR-126-MO; and Chief Judge Ann Aiken in *United States* v. *Mahan,* 06-CR-60045-AA, the Court concludes the government has established there is a rational relationship between the disparity of treatment of defendants in § 1B1.10 and a legitimate governmental purpose. Specifically, the Sentencing Commission found the distinction between departures and variances was "'difficult to apply' and 'prompted litigation.'" *United States v. Gonzalez,* No. 10CR1009- LAB 2015 WL 4760286, at *1 n.1 (S.D. Cal. Aug. 11, 2015)(quoting Notice of Final Action Regarding Amendment to Policy Statement 181.10, 76 Fed. Reg. 41332, 41332, 41334 (July 13, 2011)). 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." *Davis,* 739 F.3d at 1225. Defendant has not negated "every conceivable basis which might support" the Commission's decision prohibiting reductions below the amended guidelines

range except in the case of substantial assistance nor has Defendant established there is not "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Ellsworth*, 456 F.3d at 1150. As the Supreme Court has noted "'equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' [When] rational basis review applies and 'there are plausible reasons for Congress' action, our inquiry is at an end.'" *Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015)(quoting *FCC*, 508 U.S. at 313-14).

Accordingly, the Court concludes application of § 1B1.10(b)(2)(A) to Defendant does not violate his right to equal protection.

V. Constitutional Avoidance.

Finally, Defendant asserts the Court does not need to resolve Defendant's equal-protection challenge if it instead applies the doctrine of constitutional avoidance. Defendant asserts he has raised "serious questions" regarding the constitutionality of interpreting § 1B1.10 to prohibit consideration of variances and noncooperation departures and contends the Court should interpret the policy statement in a manner that avoids these constitutional questions. Specifically, Defendant asserts under the doctrine of constitutional avoidance the Court should interpret "amended guidelines range" to include

previously-imposed variances and departures. The Court, however, has not found there is a constitutional violation nor under rational-basis review that there are serious questions regarding the constitutionality of § 1B1.10 as to it prohibiting consideration of variances and noncooperation departures. The Court, therefore, declines to apply the doctrine of constitutional avoidance.

VI. Certificate of Appealability

Because the legal issues raised in Defendant's Motion are not clearly established and because Defendant's arguments have the possibility of reasonable disagreement, the Court grants Defendant a certificate of appealability.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#42) for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c) and U.S.S.G. Amendment 782 and **GRANTS** Defendant a certificate of appealability.

IT IS SO ORDERED.

DATED this 5th day of February, 2016.

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CASE No. 3:10-cr-00510-JO-3
	)	
v.	)	**OPINION AND ORDER**
	)	
MOISES LOPEZ-PRADO	)	
	)	
Defendant.	)	

JONES, Judge:

Defendant, Moises Lopez-Prado ("Lopez-Prado"), filed a motion under 18 U.S.C. § 3582(c)(2) seeking a two-level reduction of his sentence based on United States Sentencing Guidelines ("Guidelines" or "U.S.S.G.") Amendment 782. The United States opposed this motion, arguing that under Amendment 782, Lopez-Prado's original sentence is lower than his amended Guidelines range and under the Sentencing Commission's policy statement U.S.S.G. § 1B1.10, not eligible for a reduction. For the reasons that follow, Lopez-Prado's motion is DENIED.

STANDARD

A. Sentence Reduction Under 18 U.S.C. § 3582

"A federal court generally 'may not modify a term of imprisonment once it has been imposed.'" *Dillon v. United States*, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. § 3582(c)). Congress provided a narrow exception to that rule "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." 18 U.S.C. § 3582(c)(2); *see also Dillon*, 560 U.S. at 825 (noting that "§ 3582(c)(2) does not authorize a sentencing or resentencing proceeding" but instead provides for the "'modif[ication of] a term of imprisonment' by giving courts the power to reduce an otherwise final sentence in circumstances specified by the Commission") (alteration

in original). This authority to modify a previously-imposed prison sentence "represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon*, 560 U.S. at 828.

Congress gave the Sentencing Commission a "substantial role . . . with respect to sentence-modification proceedings." *Dillon*, 560 U.S. at 826. Congress charged the Sentencing Commission "both with deciding whether to amend the Guidelines, and with determining whether and to what extent an amendment will be retroactive." *Dillon*, 560 U.S. at 826 (citation omitted); *see also* 28 U.S.C. § 994(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."). Thus, courts are "constrained by the Commission's statements dictating 'by what amount' the sentence of a prisoner serving a term of imprisonment affected by the amendment 'may be reduced.'" *Dillon*, 560 U.S. at 826 (quoting 28 U.S.C. § 994(u)).

In § 3582(c), Congress specifically required that any sentence modification be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. §§ 3582(c)(1)(A)(ii), 3582(c)(2); *see also Dillon*, 560 U.S. at 821 ("Any reduction [pursuant to § 3582(c)(2)] must be consistent with applicable policy statements issued by the Sentencing Commission."). The policy statement governing sentencing modifications after a retroactive amendment to the Guidelines instructs courts not to reduce a term of imprisonment if the amendment "does not have the effect of lowering the defendant's applicable guideline range." U.S.S.G. Manual § 1B1.10(a)(2)(B).

In deciding a motion under § 3582(c)(2), a court must follow a two-step process. "At step one, § 3582(c)(2) requires the court to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction

authorized." *Dillon*, 560 U.S. at 827. This requires determining the amended guideline range, which is the range that would have been applicable to the defendant if the amendment had been in effect at the time of the defendant's original sentencing. *Dillon*, 560 U.S. at 827; *see also* § 1B1.10(b)(1). In making this determination, courts are to substitute only the new amendment "for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." § 1B1.10(b)(1); *see also Dillon*, 860 U.S. at 827.

The Sentencing Commission further limited application of a retroactive Guidelines amendment by instructing that a court cannot reduce a sentence "to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection," with the exception of making a reduction that is comparable to what was made at the time of original sentencing as a result of "a government motion to reflect the defendant's substantial assistance to authorities . . . ."[1] § 1B1.10(b)(2); *see also Dillon*, 560 U.S. at 827 (discussing a previous version § 1B1.10(b)(2) that allowed a court to apply comparable departures and variances as were applied at the original sentencing and noting this instruction was "[c]onsistent with the limited nature of § 3582(c)(2) proceedings"). Step two of the § 3582(c) inquiry is to consider any applicable § 3553(a) factors and determine, in the discretion of the Court, whether any reduction authorized by the Guidelines amendment is warranted in whole or in part. *See Dillon*, 560 U.S. at 827; 18 U.S.C. § 3582(c)(1)(A).

"This circumscribed inquiry [under § 3582(c)(2)] is not to be treated as a 'plenary resentencing proceedings.'" *United States v. Navarro*, 800 F.3d 1104, 1110 (9th Cir. 2015) (quoting *Dillon*, 560 U.S. at 826). The appropriate use of sentence-modification under § 3582(c)(2) "'is to adjust a sentence in light of a Guidelines amendment,' so courts may not use such proceedings to 'reconsider [] a sentence based on factors unrelated to a retroactive

[1] Departures other than departures that reflect the defendant's substantial assistance to authorities are commonly referred to as "non-cooperation departures" in this district. *See e.g., United States v. Snyder*, No. 3:00-CR-00371-BR, 2016 WL 520953, at *8 (D. Or. 2016); *United States v. Guzman*, 3:12-cr-291-SI, at 22 (D. Or. 2015).

Guidelines amendment.'" *Navarro*, 800 F.3d at 1110 (quoting *United States v. Fox*, 631 F.3d 1128, 1132 (9th Cir. 2011)).

B. Equal Protection under the United States Constitution

"When the Commission enacts Guidelines treating one class of offenders differently from another, equal protection generally requires that the classification be 'rationally related to a legitimate government interest.'"[2] *Navarro*, 800 F.3d at 1113 (quoting *United States v. Ruiz-Chairez*, 493 F.3d 1089, 1091 (9th Cir. 2007)). If the classification implicates a fundamental right or a suspect classification, the Sentencing Commission's decision would be subject to a higher level of scrutiny. *Navarro*, 800 F.3d at 1113 n.7. Lopez-Prado argues that because his liberty is at stake, heightened scrutiny is appropriate. This argument, however, is foreclosed by the Ninth Circuit's decision in *Navarro*, which noted that rational-basis review is generally applied when the Guidelines treat classes of offenders differently and applied rational-basis review in considering constitutional challenges to § 1B1.10. *Navarro*, 800 F.3d at 1113. The Court is bound by this precedent.

A classification is rationally related to a legitimate government 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) (emphasis added). Under rational-basis review, the burden is on the party seeking to disprove the rationality of the relationship between the classification and the purpose, and that party must "negative every conceivable basis which might support" the classification "whether or not the basis has a foundation in the record." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (quotation marks and citations omitted). Thus, courts are to accept generalizations regarding the rational basis, "even when there is an imperfect fit between means and ends" and even if the classification "is not made with mathematical nicety or

[2] As noted by the Ninth Circuit, the Guidelines technically are not governed by the Equal Protection Clause of the Fourteenth Amendment, which applies only to states, but the Due Process Clause of the Fifth Amendment "similarly prohibits unjustified discrimination by federal actors" and the "'approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.'" *Navarro*, 800 F.3d at 1112 n.6 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

because in practice it results in some inequality." *Heller*, 509 U.S. at 321 (quotation marks and citation omitted).

BACKGROUND

On May 23, 2013, Lopez-Prado pled guilty to Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine and Cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(a), (b)(1)(c), 21 U.S.C. § 846, and 18 U.S.C. § 2. Lopez-Prado's total offense level ("TOL") prior to departures, was 35 and his criminal history category was II, resulting in an advisory guideline range (before departures) of 188 to 235 months. The TOL of 35 was determined by a base-offense level of 36, a two-level enhancement for Lopez-Prado's role as organizer and a three-level reduction for his acceptance of responsibility. Pursuant to 18 U.S.C. § 3553(a), I considered Lopez-Prado's diminished mental capacity and granted him a four-level downward variance. I then imposed a sentence of 132 months of imprisonment.

DISCUSSION

Lopez-Prado argues that in addition to the sentence modification under Amendment 782, he should continue to receive the benefit of the downward variance agreed upon in his plea agreement and applied by the court in his original sentencing. Lopez-Prado sets forth four arguments: (1) that the current interpretation of § 1B1.10(b)(2)(A) is in irreconcilable conflict with the statutory direction in 28 U.S.C. § 991(b)(1)(B) and 18 U.S.C. § 3553(a)(6); (2) that the limitation in § 1B1.10(b)(1) is inconsistent with the statutory direction in 28 U.S.C. § 991(b)(1)(B) and 18 U.S.C. § 3553(a)(6) because variances and departures are "guideline application decisions"; (3) that the United State's application of the current version of U.S.S.G. § 1B1.10(b)(2)(A) violates the Equal Protection Clause, and; (4) that under the doctrine of constitutional avoidance, the Court should interpret § 1B1.10 in a manner consistent with Lopez-Prado's interpretation.

A. Whether the limitation in § 1B1.10(b)(2)(A) irreconcilably conflicts with the statutory direction in 28 U.S.C. § 991(b)(1)(B)

Lopez-Prado argues that § 1B1.10(b)(2) conflicts with the Sentencing Commission's statutory directive in 28 U.S.C. § 991(b), which states:

> (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.

28 U.S.C. § 991(b) (emphasis added). Lopez-Prado contends that by permitting courts to grant sentence reductions to people who did not receive variances and non-cooperation departures, but requiring them to deny reductions to people who received such variances and departures, § 1B1.10(b)(2) violates the goals set out in §§ 991(b)(1)(A) and (b)(1)(B) by nullifying the determinations previously made by the sentencing court and creating unwarranted disparities.

In *United States v. Tercero*, 734 F.3d 979 (9th Cir. 2013) the Ninth Circuit considered whether § 1B1.10, in particular its prohibition on consideration of variances and departures other than for substantial assistance, conflicted "with the purpose of the Guidelines…to bring about an effective, fair sentencing system, with honest, uniform and proportionate sentences." *Tercero*, 734 F.3d at 983. The Court found that "[a] motion brought under § 3582(c)(2) does not authorize a sentencing or resentencing proceeding. Instead, it provides for the modification of a term of imprisonment by giving courts the power to reduce an otherwise final sentence in circumstances specified by the Commission." *Tercero*, 734 F.3d at 983 (quotations omitted). The Court further considered the broad power of the Sentencing Commission to establish sentence modification limitations and the fact that at the original sentencing proceeding a defendant received the benefit

of considerations of all departures and variances. *Tercero*, 734 F.3d at 983. Based on these considerations, the Court concluded that it would be inappropriate for a court to reweigh the § 3553(a) factors in considering a sentence modification.

Based on the Court's ruling in Tercero, I find that the limitation in § 1B1.10(b)(2)(A) precluding consideration of variances and non-cooperation departures in the context of sentencing modification under 18 U.S.C. § 3582(c) does not conflict with 18 U.S.C. § 991(b).

B. Whether Variances and Departures are "Guideline Application Decisions"

Lopez-Prado argues variances and departures are "guideline application decisions" and, pursuant to the instructions provided for in § 1B1.10(b)(1),[3] the Court "shall substitute" the amended guidelines range for the initial range "and shall leave all other guideline application decisions unaffected." He contends that the limitation in § 1B1.10(b)(2) undoes previous guideline applications and previous § 3553(a) determinations made by the original sentencing court. Further, that this prohibition of sentence modification for people who received variances or non-cooperation departures, violates § 991(b) and § 3553(a) by injecting disparity and unfairness into the sentence.

A "departure" is a divergence from the originally calculated sentence range based on specific Guidelines departure provision, whereas a "variance" is a divergence from the Guidelines range based on an exercise of the Court's discretion under § 3553(a). *See United States v. Fumo*, 655 F.3d 288, 317 (3d Cir. 2011), *as amended* (Sept. 15, 2011). The phrases "guideline application decision" and "amended guideline range," in isolation, may be ambiguous as to whether they include departures and variances. While not binding on the Court, the recent

[3] (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.

decision in *United States v. Guzman,* 3:12-cr-291-SI (D. Or. 2015) determined that "guideline application decisions" are not included in the "applicable guideline range." *Guzman*, 3:12-cr-291-SI, at 18. Judge Simon reasoned that "if departures and variances were 'guideline application decisions,' they would necessarily be included in the amended 'applicable guideline range' (or 'amended guideline range'). *Guzman*, 3:12-cr-291-SI, at 18. Furthermore, "[w]hen considering the full text of § 1B1.10, its commentary, the text of its previous version, and applicable case law…it is evident that these phrases do not include variances and departures." *Guzman*, 3:12-cr-291-SI, at 11.

1. Text and context of current version of § 1B1.10

As noted by Judge Simon, if departures and variances were "guideline application decisions" that had to remain unaffected under § 1B1.10 and were therefore included in the "amended guideline range," then there would be no need to create the exception laid out in § 1B1.10(b)(2)(B) which allows a reduction below the "amended guideline range" based on substantial assistance. *Guzman*, 3:12-cr-291-SI, at 12. The clear discernment between "departures" and "guideline application decisions" is consistent with the Guidelines' definition of "departure"—an "imposition of a sentence outside the applicable range or of a sentence that is otherwise different from the guideline sentence." U.S.S.G. Manual § 1B1.10, Application Note 1(E).

a. Current version of § 1B1.10 commentary

The interpretation that departures and variances are not "guideline application decisions" is consistent with three Application Notes of the Guidelines' commentary. The Application Note to § 1B1.10(a) defines "applicable guideline range" as "the guideline range that … is determined before consideration of any departure provision in the Guidelines Manual or a variance." U.S.S.G. Manual § 1B1.10, cmt. n. 1(A). Although this commentary defines the phrase for purpose of § 1B1.10(a), *Guzman* recognized that there is "no reasoning that would overcome the

presumption that the same definition applies when determining the 'applicable' Guidelines range for purposes of § 1B1.10(b)." 3:12-cr-291-SI, at 13–14 (quotations omitted).

Similarly, Application Note of subsection (b)(2), which provides examples of how the amended guideline range is to be calculated, demonstrates that departures and variances are not "guideline application decisions" that are part of the "amended guideline range." U.S.S.G. Manual § 1B1.10, cmt. n. 3. "The example discussing original sentences that were 'outside the guideline range applicable to the defendant at the time of sentencing' because of downward departures or variances clarifies that such downward adjustments do not carry over into new the sentence that may be imposed pursuant to a retroactive Guidelines amendment." 3:12-cr-291-SI, at 14 (quoting U.S.S.G. Manual § 1B1.10, cmt. n. 3).

Finally, the commentary to Amendment 759, which enacted the 2011 amendments to § 1B1.10, explains that departures and variances are not included in the "applicable guideline range," which means they are not included in the "amended guideline range." Amendment 759 "amends Application Note 1 to clarify that the applicable guideline range referred to in § 1B1.10 is the guideline range determined pursuant to § 1B1.10(a), which is determined before consideration of *any* departure provision in the Guidelines Manual or *any* variance." U.S.S.G. Manual App'x C, Amend. 759, Reason for Amendment, at 421 (2011) (emphasis added).

The Guidelines commentary "is akin to an agency's interpretation of its own legislative rules" and if it "does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quotations omitted). I agree with Judge Simon that the commentary's interpretation that "guideline application decisions" and "amended guideline range" do not include departures or variances.

2. Text and context of the previous version of § 1B1.10

The previous version of § 1B1.10 contained the same provisions instructing courts to leave "guideline application decisions" unaffected in § 1B1.10(b)(1) and foreclosing courts from reducing a sentence to a term less than the minimum of the "amended guideline range" in § 1B1.10(b)(2)(A). U.S.S.G. Manual § 1B1.10 (2010). But the previous version had different text in § 1B1.10(b)(2)(B), instructing that on modification, reductions comparable to original departures "*may*" be appropriate but that reductions comparable to original variances "generally would not be appropriate." U.S.S.G. Manual § 1B1.10(b)(2)(B) (2010) (emphasis added). It is this discretion previously awarded to the courts that demonstrates departures and variances are not "guideline application decisions." "If departures and variances were 'guideline application decisions' that were required to remain unaffected, then the court would have no need of the 'discretion' to apply departures and variances because they already would need to be included, and the discretion not to apply them would run afoul of the directive to leave 'guideline application decisions' unaffected." *Guzman*, 3:12-cr-291-SI, at 16. The fact that the current version of § 1B1.10(b)(2) removes the Court's discretion to consider variances and departures other than for substantial assistance does not convert departures and variances into "guideline application decisions" that are part of the "amended guideline range." *Guzman*, 3:12-cr-291-SI, at 16.

3. Case Law

The *Guzman* court relied on decisions from other circuits[4] that found, under the previous version of § 1B1.10, the original departures and variances are not required to be included when modifying a sentence under § 3582 (c)(2)—rather, the courts have discretion to decide whether a departure from the new sentencing range is warranted. *See United States v. Vautier*, 144 F.3d 756, 761 (11th Cir. 1998); *United States v. Wyatt*, 115 F.3d 606, 610 (8th Cir. 1997). Judge

[4] *See e.g., United States v. Hogan*, 722 F.3d 55, 60 (1st Cir. 2013); *United States v. Boyd*, 721 F.3d 1259, 1260–64 (10th Cir. 2013); *United States v. Montanez*, 717 F.3d 287, 292 (2d Cir. 2013); *United States v. Valdez*, 492 F. App'x 895, 899 (10th Cir. 2012).

Simon found this interpretation consistent with the current text of § 1B1.10. *Guzman*, 3:12-cr-291-SI, at 19. Additionally, the Ninth Circuit determined that departures and variances are not included in the "applicable guideline range." *See United States v. Pleasant*, 704 F.3d 808, 812 (9th Cir.), *cert. denied*, 134 S. Ct. 824 (2013) ("In short, Amendment 759 makes clear that the applicable guideline is derived pre-departure and pre-variance."). While not directly addressing the issue before the Court, the Ninth Circuit's conclusion that departures and variances are not included in the "applicable guideline range" forecloses the argument that they are "guideline application decisions" or that they should be included in the "amended guideline range."

By reviewing the text and commentary of the current version of § 1B1.10, the text of the previous version, other circuits' decisions on this matter, and by examining the Ninth Circuit's opinion on an analogous issue, I conclude that variances and departures are not guideline application decisions under § 1B1.10(b)(1).

C. Whether the United State's application of the current version of U.S.S.G. § 1B1.10(b)(2)(A) violates the Equal Protection Clause

The previous version of § 1B1.10(b)(2) gave courts considering a sentence reduction the discretion to impose variances and departures comparable to those that were imposed during the original sentencing. U.S.S.G. Manual § 1B1.10(b)(2) (2010). The current version of § 1B1.10(b)(2) eliminates this discretion and prohibits a court from reducing sentences based on previously-imposed variances and non-cooperation departures. U.S.S.G. Manual § 1B1.10(b)(2) (2011). Lopez-Prado argues that the denial of sentence reductions to the class of defendants who previously received variances or non-cooperation departures violates the Equal Protection Clause. Specifically, Lopez-Prado asserts that prohibiting a reduction for people deemed to be deserving of lower, below-guideline sentences, but permitting a reduction for people deemed to require longer, within-guideline sentences, creates an irrational and arbitrary classification without sufficient justification.

1. Whether there is an irrational or arbitrary classification

Lopez-Prado argues that the classification created by § 1B1.10(b)(2) presents a concern of arbitrary classification in the following hypothetical: A drug conspiracy involving two codefendants, both with the same drug quantity level 36 and criminal history category III, with an adjustment for acceptance of responsibility. Defendant A received a 168-month sentence at the low end of the guideline range. Defendant B received a 135-month sentence, two levels below the guideline range because he suffered from diminished capacity.

Under Lopez-Prado's offered hypothetical, it is certainly possible that in some circumstances Defendant A, who previously received a more-stringent sentence, may be eligible for a sentence reduction while Defendant B, who received a less stringent sentence, may not benefit from the previously awarded variances and non-cooperation departures. However, the classification is not arbitrary just because it produces some inequality. *Heller*, 509 U.S. at 320. Rather, to demonstrate that the classification is irrational or arbitrary, Lopez-Prado must negate every conceivable basis which may support it. *Heller*, 509 U.S. at 320.

As noted in *Guzman*, "the application of a sentence reduction pursuant to a retroactive Guidelines amendment is discretionary." *Guzman,* 3:12-cr-291-SI, at 28–29. It is therefore possible that a judge considering a reduction for Defendant A would not apply the sentence reduction, believing the original longer sentence is sufficient but not greater than necessary to carry out the purposes of § 3553(a). If that were the case, then there would be no unwarranted disparity between Defendants A and B. As demonstrated, Lopez-Prado fails to set forth sufficient evidence that classification in § 1B1.10(b) rises to the level of an equal protection violation.

2. Whether the classification, if one exists, survives rational basis

Lopez-Prado argues that the Sentencing Commission did not provide any rationale sufficient to justify the disparate treatment of defendants who received variances and non-cooperation departures and those who did not. Lopez-Prado's burden is to negate "every

conceivable basis which might support" the classification "whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320 (quotation marks and citations omitted). In fact, under rational-basis review, decisions based on rational speculation, unsupported by evidence or empirical data, are sufficient, "regardless of whether [the policy statement] is an 'exact fit' for the interest at issue" or "is an imperfect fit between means and ends." *Navarro,* 800 F.3d at 1114. Furthermore, "a classification does not fail rational-basis review...because in practice it results in some inequality." *Aleman v. Glickman*, 217 F.3d 1191, 1201 (9th Cir. 2000).

The court in *Guzman,* faced with the same argument, looked to whether the defendants met the burden under rational-basis review to show that there is no reasonably conceivable set of facts that could provide a rational basis for the Sentencing Commission's classification for persons eligible for a sentence reduction. *Guzman,* 3:12-cr-291-SI, at 29. The court concluded that the Sentencing Commission's proffered reasons for the amendment to § 1B1.10(b)(2)(A), (1) reducing complexity, litigation, and disparities and promoting conformity; and (2) the concern relating to "windfall" sentences upon modification pass rational-basis muster.

As in *Guzman*, Lopez-Prado's argument that the revised version of the statute increases the likelihood of litigation by removing the judge's discretion to apply comparable variances and non-cooperation departures fails. "The Sentencing Commission's conclusion that eliminating variances and non-cooperation departures made sentencing modifications less complex and thereby would reduce litigation survives rational-bases review." *Guzman,* 3:12-cr-291-SI, at 31. Additionally, the objective of reducing disparity is also sufficient—"it was rational for the Sentencing Commission to be concerned that retroactive Guidelines amendments may not be imposed uniformly." *Guzman,* 3:12-cr-291-SI, at 31.

Under rational-basis review the challenged classification "must be upheld against equal protection challenge 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *United States v. Ellsworth*, 456 F.3d 1146, 1150 (9th Cir.

2006) (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)(emphasis in *Ellsworth*)). Lopez-Prado has not negated "every conceivable basis which might support" the Commission's decision prohibiting reductions below the amended guidelines range except in the case of substantial assistance nor has Lopez-Prado established there is not "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Ellsworth*, 456 F.3d at 1150. Therefore, I hold that the current version of U.S.S.G. § 1B1.10(b)(2)(A) as applied does not violate the Equal Protection Clause.

D. Whether the Doctrine of Constitutional Avoidance Applies

Finally, Lopez-Prado contends the doctrine of constitutional avoidance mandates the Court to construe the language of the policy statement and its commentary to allow him a sentence reduction that keeps intact the variance he previously received. Failure to do so, Lopez-Prado argues, violates the Due Process Clause and the constitutionally-based retroactivity doctrine.

The doctrine of constitutional avoidance requires courts to adopt any "fairly possible" construction of a statute that avoids serious constitutional concerns. *Zadvydas v. Davis,* 533 U.S. 678, 689 (2001); *United States v. Buckland*, 289 F.3d 558, 564–65 (9th Cir. 2002) (en banc). As previously discussed, I do not find a constitutional violation and do not find, under rational-basis review, that serious questions arise regarding the constitutionality of § 1B1.10's prohibition on considering variances and non-cooperation departures. Thus, I decline to apply the doctrine of constitutional avoidance.

CONCLUSION

Lopez-Prado's motion to reduce his sentence under 18 U.S.C. § 3582(c)(2) is DENIED.

IT IS SO ORDERED.

DATED this 24 day of March 2016.

Robert E. Jones
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES, **3:07-CR-00050-BR**

Plaintiff, **OPINION AND ORDER**

v.

PABLO BARAJAS LOPEZ,

Defendant.

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BROWN, Judge.

This matter comes before the Court on Defendant Pablo Barajas Lopez's Motion (#752) to Modify an Imposed Term of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(2) and Amendment to Drugs Quantity Table under Retroactive Amendment 782 Effective November 1, 2015.

For the reasons that follow, the Court **DENIES** Defendant's Motion but **GRANTS** Defendant a certificate of appealability.

BACKGROUND

On August 20, 2009, Defendant Sergio Aguilar-Sahagun was charged in a Third Superseding Indictment with one count of Conspiracy to Possess with Intent to Distribute Methamphetamine, Cocaine, and Heroin and one count of Distribution of Cocaine.

On October 8, 2009, a jury entered a Verdict finding Defendant guilty of Conspiracy to Possess with Intent to Distribute Methamphetamine.

The Presentence Report (PSR) dated April 8, 2010, recommended a Base Offense Level of 38 plus a two-level firearms

adjustment and a three-level leadership adjustment for a Total Offense Level of 43. At Criminal History Category I, the advisory United States Sentencing Guidelines (U.S.S.G.) range was life imprisonment.

On May 5, 2011, the Court determined Defendant's criminal history category was I and the applicable conduct of 15 kilograms of a mixture or substance containing methamphetamine resulted in a base offense level of 38. The Court added a two-level firearms adjustment and a two-level leadership adjustment for a total offense level of 42, resulting in an advisory Sentencing Guidelines range of 360 months to life imprisonment. The Court varied Defendant's sentence downward and sentenced Defendant to a 180-month term of imprisonment.

Effective November 1, 2014, the United States Sentencing Commission adopted Amendment 782, which modified U.S.S.G. § 2D1.1 to lower the sentencing range for certain categories of drug-related offenses. The Sentencing Commission also adopted Amendment 788 effective November 1, 2014, which authorized retroactive application of Amendment 782 to defendants who were sentenced before its effective date.

On November 2, 2015, Defendant filed a Motion to Modify Sentence based on Amendment 782. The Court took the matter under advisement on February 20, 2016.

DISCUSSION

Pursuant to Amendment 782 Defendant seeks a two-level reduction in his sentence to 135 months. The government asserts even if Defendant's guideline range is affected by Amendment 782, he would be eligible for a reduction to 292 months at most. According to the government, any further reduction of Defendant's sentence would violate the policy set out in U.S.S.G. § 1B1.10(b)(2)(A) and would exceed the Court's authority to modify a sentence under 18 U.S.C. § 3582(c).

Defendant, in turn, argues he is entitled to a reduction in his sentence to 135 months notwithstanding § 1B1.10(b)(2)(A) because application of § 1B1.10(b)(2)(A) to his sentence would (1) create an "irreconcilable conflict" with 8 U.S.C. § 991, the implementing regulation, and (2) violate the Equal Protection Clause. Defendant also asserts the doctrine of constitutional avoidance requires the Court to interpret § 1B1.10 to avoid constitutional concerns.

I. Sentence Modification Authority.

"A federal court generally 'may not modify a term of imprisonment once it has been imposed.'" *Dillon v. United States*, 560 U.S. 817, 819 (2010)(quoting 18 U.S.C. § 3582(c)). "Congress has provided an exception to that rule '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.'" *Dillon*, 560 U.S. at 819 (quoting § 3582(c)(2)).

As noted, effective November 1, 2014, the Sentencing Commission modified § 2D1.1 to lower the sentencing range for certain categories of drug-related offenses, and the Commission authorized retroactive application of Amendment 782 to defendants who were sentenced before its effective date.

When the Sentencing Commission lowers a sentencing range as it did with Amendment 782, 18 U.S.C. § 3582(c)(2) authorizes a court to reduce a defendant's term of imprisonment only after the court finds such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. The court must then determine whether the sentence should be reduced based on factors set out in 18 U.S.C. § 3553(a). *Dillon*, 560 U.S. at 826.

The Sentencing Commission policy statement at issue here is U.S.S.G. § 1B1.10, which provides in pertinent part:

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

> applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
>
> (2) Limitation and Prohibition on Extent of Reduction.--
>
> > (A) Limitation.-- . . . the court shall not reduce the defendant's term of imprisonment . . . 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.

Emphasis added. Application Note 1(A) explains in pertinent part:

> 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: . . . (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.

II. Departures and variances are not "guideline application decisions" and are not included in the "amended guideline range."

As noted, when the court considers a sentence modification pursuant to a retroactive change in the Sentencing Guidelines, § 1B1.10(b)(1) provides the changed provision is incorporated and "all other guideline application decisions" must remain unaffected. Defendant asserts variances and departures are "guideline application decisions" that must remain unaffected. According to Defendant, therefore, variances and noncooperation departures should be included in calculating the "amended guideline range."

For the reasons this Court set out in *United States v. Castaneda*, 3:11-CR-412-BR, and *United States v. Aguilar-Sahagan*, 3:10-CR-00311-BR, and Judge Michael Simon set out in *United States v. Gorgatenko*, 3:10-CR-00396-SI, the Court concludes the terms "guideline application decision" and "amended guideline range" are not ambiguous with respect to the inclusion of departures and variances when the Court considers the text of § 1B1.10, its application notes, the text of the previous version of § 1B1.10, and the applicable case law. Considering these sources together, the Court concludes § 1B1.10 unambiguously does not include departures and variances in the amended guideline range.

III. Application of § 1B1.10(b)(2)(A) does not violate the implementing regulation.

As noted, Defendant asserts application of § 1B1.10(b)(2)(A) under the circumstances of his case would create an "irreconcilable conflict" with 28 U.S.C. § 991(b), the implementing regulation, if the Court concludes § 1B1.10 does not include departures and variances. Specifically, § 991(b) mandates in pertinent part that one of the purposes of the United States Sentencing Commission is to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Defendant asserts an interpretation of § 1B1.10 that permits courts to grant sentence reductions to people who did not receive variances and noncooperation departures and requires courts to deny reductions to people who received such variances and departures would nullify the sentencing determinations previously made by the sentencing court and create unwarranted disparities.

For the reasons this Court set out in *Castaneda* and *Aguilar-Sahagan*; explained by Judge Simon in *Gorgatenko*; and also explained by the court in *United States v. Rodriguez*, No. 12cr1121-LAB, 2015 WL 4235363 (S.D. Cal. July 8, 2015), this Court concludes the limitation in § 1B1.10(b)(2)(A) that precludes consideration of variances and noncooperation departures in the context of a sentence modification under 18

U.S.C. § 3582(c) does not conflict with 18 U.S.C. § 991(b).

IV. Application of § 1B1.10(b)(2)(A) does not violate the Equal Protection Clause.

To the extent that the Court concludes § 1B1.10(b)(2) prohibits courts from reducing sentences based on previously-imposed variances and noncooperation departures, Defendant also asserts application of § 1B1.10(b)(2)(A) to Defendant's case violates his right to equal protection.

A. The rational-basis test applies.

"'The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.'" *Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015)(quoting *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013)).

Defendant, however, does not assert he is a member of a suspect class. In addition, Defendant cannot establish he is being deprived of a fundamental right because a defendant does not have a constitutional right to a sentence reduction based on subsequent guideline amendments. *See Dillon*, 560 U.S. at 827-28 (§ 3582 is a "narrow exception to the rule of finality," and sentencing modification proceedings under that statute "are not constitutionally compelled."). The Court, therefore, concludes Defendant's equal-protection challenge to § 1B1.10(b) is subject to a rational-basis review. *See, e.g., 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.").

Under rational-basis review the challenged classification "must be upheld against equal protection challenge 'if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.'" *United States v. Ellsworth*, 456 F.3d 1146, 1150 (9th Cir. 2006)(quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)(emphasis in *Ellsworth*)). "A classification . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* (quotations omitted).

B. Analysis.

For the reasons this Court set out in *Castaneda* and *Aguilar-Sahagan* and for the reasons set out by Judge Simon in *Gorgatenko*; Judge Owen Panner in *United States v. Garcia-Uribe*, 08-CR-30039-PA; Judge Michael Mosman in *United States v. Heckman*, 10-CR-143-MO, and *United States v. Padilla-Diaz*, 08-CR-126-MO; and Chief Judge Ann Aiken in *United States v. Mahan*, 06-CR-60045-

AA, the Court concludes the government has established there is a rational relationship between the disparity of treatment of defendants in § 1B1.10 and a legitimate governmental purpose. Specifically, the Sentencing Commission found the distinction between departures and variances was "'difficult to apply' and 'prompted litigation.'" *United States v. Gonzalez*, No. 10CR1009-LAB 2015 WL 4760286, at *1 n.1 (S.D. Cal. Aug. 11, 2015)(quoting Notice of Final Action Regarding Amendment to Policy Statement 181.10, 76 Fed. Reg. 41332, 41332, 41334 (July 13, 2011)). 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." *Davis*, 739 F.3d at 1225. Defendant has not negated "every conceivable basis which might support" the Commission's decision prohibiting reductions below the amended guidelines range except in the case of substantial assistance nor has Defendant established there is not "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Ellsworth*, 456 F.3d at 1150. As the Supreme Court has noted "'equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' [When] rational basis review applies and 'there are plausible reasons for Congress' action, our inquiry is at an

end.'" *Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015)(quoting *FCC*, 508 U.S. at 313-14).

Accordingly, the Court concludes application of § 1B1.10(b)(2)(A) to Defendant does not violate his right to equal protection.

V. Constitutional Avoidance.

Finally, Defendant asserts the Court does not need to resolve Defendant's equal-protection challenge if it instead applies the doctrine of constitutional avoidance. Defendant asserts he has raised "serious questions" regarding the constitutionality of interpreting § 1B1.10 to prohibit consideration of variances and noncooperation departures and contends the Court should interpret the policy statement in a manner that avoids these constitutional questions. Specifically, Defendant asserts under the doctrine of constitutional avoidance the Court should interpret "amended guidelines range" to include previously-imposed variances and departures. The Court, however, has not found there is a constitutional violation nor under rational-basis review that there are serious questions regarding the constitutionality of § 1B1.10 to the extent that it prohibits consideration of variances and noncooperation departures. The Court, therefore, declines to apply the doctrine of constitutional avoidance.

VI. Certificate of Appealability

Because the legal issues raised in Defendant's Motion are not clearly established and because Defendant's arguments have the possibility of reasonable disagreement, the Court grants Defendant a certificate of appealability.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#752) to Modify an Imposed Term of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(2) and Amendment to Drugs Quantity Table under Retroactive Amendment 782 Effective November 1, 2015, and **GRANTS** Defendant a certificate of appealability.

IT IS SO ORDERED.

DATED this 31st day of March, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANCISCO JAVIER CARDENAS -CORONEL,

Defendant.

No. 3:12-cr-00227-HZ-1

OPINION & ORDER

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HERNÁNDEZ, District Judge:

Defendant Francisco Javier Cardenas-Coronel brings this Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c) and Amendment 782 of the United States Sentencing Guidelines (U.S.S.G.). For the reasons that follow, Defendant's motion is denied, but the Court grants Defendant a certificate of appealability.

BACKGROUND

Defendant was convicted by guilty plea of "Conspiracy to Distribute and Possess with Intent to Distribute 500 Grams or More of Cocaine." Def.'s Suppl. Mem. Ex. A, ECF 136-1. In the plea agreement, Defendant and the Government agreed to a base offense level of 32 on the then-existing drug quantity table. Id. at Ex. B, ECF 136-2. The parties agreed to recommend a three-level downward adjustment for acceptance of responsibility and a one-level variance for Defendant's agreement to forego filing pretrial motions. In addition, the Government agreed to recommend an additional downward variance.

At sentencing, the Statement of Reasons reflected an overall Total Offense Level of 29, a Criminal History Category of II, and a guideline sentencing range of 108 to 135 months of imprisonment. Id. at Ex. E, ECF 139. The parties agreed to recommend a sentence of 70 months. On March 12, 2014, the Court followed the parties' recommendation and imposed an overall sentence of 70 months of imprisonment, to be followed by a four-year term of supervised release. Id. at Ex. A.

Effective November 1, 2014, the United States Sentencing Commission adopted Amendment 782, which modified U.S.S.G. § 2D1.1 to lower the sentencing range for certain categories of drug-related offenses. The Sentencing Commission also adopted Amendment 788

effective November 1, 2014, which authorized retroactive application of Amendment 782 to defendants who were sentenced before its effective date.

DISCUSSION

Defendant contends that he is eligible for a sentence reduction because the guideline applied to him, U.S.S.G. § 2D1.1, has been retroactively amended to reduce the Drug Quantity Table by two levels. 18 U.S.C. § 3582(c)(2). Defendant argues that he should receive a full, two-level reduction to the mandatory minimum sentence of 60 months, which is the bottom of the amended guideline range with full credit for the previously-imposed four-level § 3553(a) variance. The Government responds that Defendant is not eligible for the reduction because his original sentence of 70 months of imprisonment is already below the low end of what his amended advisory Sentencing Guideline range of 87 to 108 months of imprisonment would be after application of Amendment 782. Therefore, the Government contends that Defendant is ineligible for a reduction under the policy statement in U.S.S.G. § 1B1.10(b)(2)(A), which prohibits retroactive reductions below the low end of the "amended guideline range."

Defendant argues that (1) by negating warranted departures and variances from the guideline range, the policy statement in U.S.S.G. § 1B1.10(b)(2)(A) 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; and (2) 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.

As Defendant recognizes, the arguments he presents have already been considered by several other judges in this District, including Judge Brown, Judge Simon, Judge Mosman, Judge Panner, and Judge Aiken. The issues are currently on appeal before the Ninth Circuit. The

Appellate Commissioner has ordered four of those cases to go forward with consolidated briefing, and thirteen other cases have been stayed pending the result of the consolidated cases. See Order, United States v. Padilla-Diaz, No. 15-30279 (9th Cir. Feb. 9, 2016), Docket Entry 6.

This Court reviewed many of the decisions that have already addressed the arguments raised by Defendant. Finding the analysis to be thorough and legally sound, the Court follows these opinions in concluding that the limitation in § 1B1.10(b)(2)(a) that precludes consideration of variances and noncooperation departures in the context of a sentence modification under 18 U.S.C. § 3582(c) does not conflict with 18 U.S.C. § 991(b). See, e.g., United States v. Castaneda, No. 3:11-CR-00412-BR, 2016 WL 520966, at *3 (D. Or. Feb. 5, 2016); United States v. Gorgatenko, 3:10-cr-00396-SI (D. Or. Dec. 2, 2015) at 17-21, ECF 269.

In addition, the Court concludes that application of § 1B1.10(b)(2)(A) to Defendant does not violate his right to equal protection. See, e.g., Castaneda, 2016 WL 520966, at *3; Gorgatenko, 3:10-cr-00396-SI at 21-32; United States v. Garcia-Uribe, 08-cr-30039-PA at 5-8 (D. Or. Oct. 6, 2015), ECF 160; United States v. Heckman, 10-cr-143-MO at 2-3 (D. Or. Sept. 18, 2015), ECF 48; United States v. Mahan, 06-cr-60045-AA at 8-9 (D. Or. Oct. 30, 2015), ECF 158.

However, because the legal issues raised in Defendant's motion are not clearly established and because Defendant's arguments have the possibility of reasonable disagreement, the Court grants Defendant a certificate of appealability.

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CONCLUSION

Defendant's motion to reduce sentence [130] is DENIED. The Court grants Defendant a certificate of appealability.

IT IS SO ORDERED.

Dated this 27 day of June, 2016.

Marco Hernández

MARCO A. HERNÁNDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA

v.

No. 3:11-cr-00096-MO
ORDER

KAO FEY SAECHAO,

Defendant.

MOSMAN, J.,

Defendant is ineligible for a reduction in sentence under Amendment 782 because he was originally sentenced below the amended advisory Guideline range. Therefore, Defendant's Motion to Reduce Sentence [41] is DENIED.

DATED this 6th day of July, 2016.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA

v.

No. 3:08-cr-00228-MO-03
ORDER

ANGEL RAMIREZ-ARROYO,

Defendant.

MOSMAN, J.,

Defendant is ineligible for a reduction in sentence under Amendment 782 because he was originally sentenced below the amended advisory Guideline range. Therefore, Defendant's Motion to Reduce Sentence [479] is DENIED.

DATED this 24th day of August, 2016.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANKY ENRIQUE ALVARDO-GOMEZ,

Defendant.

No. 3:08-cr-00294-MO-1

OPINION AND ORDER

MOSMAN, J.,

Defendant has filed a Motion to Modify and Reduce Sentence [56], pursuant to 18 U.S.C. § 3582. For the reasons stated in my Opinions in *United States v. Heckman*, 3:10-cr-00143-MO-1 [48] and *United States v. Padilla-Diaz*, 3:08-cr-00126-MO [322], Defendant's Motion is DENIED.

IT IS SO ORDERED.

DATED this 28 day of November, 2016.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

No. 3:08-cr-00228-MO-1

v.

OPINION AND ORDER

OSCAR FRANCISCO MACIAS-OVALLE,

Defendant.

MOSMAN, J.,

Defendant has filed a Motion to Modify and Reduce Sentence [499] pursuant to 18 U.S.C. § 3582. For the reasons stated in my Opinions in *United States v. Heckman*, 3:10-cr-00143-MO-1 [48] and *United States v. Padilla-Diaz*, 3:08-cr-00126-MO-2 [322], Defendant's Motion is DENIED.

IT IS SO ORDERED.

DATED this 24 day of January, 2017.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
Chief United States District Judge

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: May 27, 2010
Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) 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;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [2] **Sentencing.**--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons,

together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. No subpar. (B) has been enacted.

3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter D. Imprisonment (Refs & Annos)

18 U.S.C.A. § 3582

§ 3582. Imposition of a sentence of imprisonment

Effective: November 2, 2002
Currentness

(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.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1998; amended Pub.L. 100-690, Title VII, § 7107, Nov. 18, 1988, 102 Stat. 4418; Pub.L. 101-647, Title XXXV, § 3588, Nov. 29, 1990, 104 Stat. 4930; Pub.L. 103-322, Title VII, § 70002, Sept. 13, 1994, 108 Stat. 1984; Pub.L. 104-294, Title VI, § 604(b)(3), Oct. 11, 1996, 110 Stat. 3506; Pub.L. 107-273, Div. B, Title III, § 3006, Nov. 2, 2002, 116 Stat. 1806.)

18 U.S.C.A. § 3582, 18 USCA § 3582
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part III. Court Officers and Employees (Refs & Annos)
Chapter 58. United States Sentencing Commission (Refs & Annos)

28 U.S.C.A. § 991

§ 991. United States Sentencing Commission; establishment and purposes

Effective: October 13, 2008
Currentness

(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.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2017; amended Pub.L. 99-22, § 1(1), Apr. 15, 1985, 99 Stat. 46; Pub.L. 103-322, Title XXVIII, § 280005(a), (c)(1), (2), Sept. 13, 1994, 108 Stat. 2096, 2097; Pub.L. 104-294, Title VI, § 604(b)(11), Oct. 11, 1996, 110 Stat. 3507; Pub.L. 108-21, Title IV, § 401(n)(1), Apr. 30, 2003, 117 Stat. 676; Pub.L. 110-406, § 16, Oct. 13, 2008, 122 Stat. 4295.)

28 U.S.C.A. § 991, 28 USCA § 991
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part III. Court Officers and Employees (Refs & Annos)
Chapter 58. United States Sentencing Commission (Refs & Annos)

28 U.S.C.A. § 994

§ 994. Duties of the Commission

Effective: October 6, 2006
Currentness

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System--

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including--

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of--

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents [1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents [1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--

(1) has been convicted of a felony that is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant--

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect--

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of--

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such

categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(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.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including--

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in--

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(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.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include--

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2019; amended Pub.L. 99-217, § 3, Dec. 26, 1985, 99 Stat. 1728; Pub.L. 99-363, § 2, July 11, 1986, 100 Stat. 770; Pub.L. 99-570, Title I, §§ 1006(b), 1008, Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 6(b), 56, Nov. 10, 1986, 100 Stat. 3592, 3611; Pub.L. 100-182, §§ 16(b), 23, Dec. 7, 1987, 101 Stat. 1269, 1271; Pub.L. 100-690, Title VII, §§ 7083, 7103(b), 7109, Nov. 18, 1988, 102 Stat. 4408, 4417, 4419; Pub.L. 103-322, Title II, § 20403(b), Title XXVIII, § 280005(c)(4), Title XXXIII, § 330003(f)(1), Sept. 13, 1994, 108 Stat. 1825, 2097, 2141; Pub.L. 108-21, Title IV, § 401(h), (k), Apr. 30, 2003, 117 Stat. 672, 674; Pub.L. 109-177, Title VII, § 735, Mar. 9, 2006, 120 Stat. 271; Pub.L. 109-304, § 17(f)(1), Oct. 6, 2006, 120 Stat. 1708.)

Footnotes

1 So in original. Probably should be "incidence".

28 U.S.C.A. § 994, 28 USCA § 994

Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOSE HERNANDEZ-MARTINEZ, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME 2 on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon, on November 12, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

Scott Kerin
Assistant U.S. Attorney
1000 SW Third, Suite 600
Portland, Oregon 97204

Jeffrey S. Sweet
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1000 SW Third, Suite 600
Portland, Oregon 97204

Further, the original and ten copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 12th day of November, 2019, with first-class postage prepaid.

Additionally, I electronically filed the foregoing APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME 2 by the using the Supreme Court's Electronic filing system on November 12, 2019.

Dated this 12th day of November, 2019.

Stephen R. Sady
Attorney for Petitioners

Subscribed and sworn to before me this 12th day of November, 2019.

OFFICIAL STAMP
JANAN STOLL
NOTARY PUBLIC-OREGON
COMMISSION NO. 965451
MY COMMISSION EXPIRES AUGUST 14, 2021

Notary Public of Oregon