

APPENDIX

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-10803

D.C. Docket No. 0:00-cr-06022-DMM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES LLEWLYN,
a.k.a. Charles Llewelyn,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(January 24, 2018)

Before JORDAN and JILL PRYOR, Circuit Judges, and REEVES,* District Judge.

REEVES, District Judge:

* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Charles Llewlyn appeals the district court's denial of his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). Because Llewlyn is ineligible for reduction of a sentence he has already completed, we affirm.

I.

Llewlyn was charged with controlled substance offenses in the Southern District of Florida in early 2000. He pled guilty in May 2000 to one count of conspiring to possess with the intent to distribute cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1). He was sentenced on September 28, 2000, to 110 months' imprisonment, to be followed by three years of supervised release.

A few months after Llewlyn began serving his Florida sentence, he was convicted of conspiring to distribute and possessing with the intent to distribute cocaine and cocaine base in the Western District of North Carolina. He was sentenced for that conviction in July 2001 to 360 months' imprisonment, to run consecutively to "any previous state or Federal sentence." Llewlyn's first sentence expired by its terms on or about November 28, 2009, at which time he began serving the 360-month sentence imposed in North Carolina. His anticipated release date is January 27, 2025.¹

In 2011 and 2012, Llewlyn filed a trio of motions in the Western District of North Carolina, seeking to reduce his 360-month sentence based on Amendment

¹ www.bop.gov/inmateloc/ (last visited January 11, 2018).

750 to the United States Sentencing Guidelines. The district court granted the motions in August 2012 and reduced Llewlyn's sentence to 292 months of imprisonment. The North Carolina sentence was further reduced to 235 months' imprisonment pursuant to Amendment 782 to the Sentencing Guidelines in January 2016.

Amendment 782 went into effect on November 1, 2014, and lowered the base offense levels for most drug offenses. *See United States v. Maiello*, 805 F.3d 992, 994 (11th Cir. 2015). Llewlyn filed a *pro se* motion pursuant to 18 U.S.C. § 3582(c)(2) in the Southern District of Florida in November 2014, seeking a reduction of his 110-month Florida sentence under Amendment 782. However, the district court summarily denied the relief because that sentence had already been completed.

Shortly thereafter, Llewlyn filed a *pro se* "traverse," arguing that he had been in custody without interruption and that his consecutive federal sentences must be viewed in the aggregate for purposes of his motion. No further activity occurred until early 2015, when Llewlyn, still acting *pro se*, filed a "motion for status" and "motion to reopen judgment to allow time for appeal or in the alternative construe defendant's traverse . . . as a motion to reconsider." The district court viewed the traverse as a motion to reconsider its order denying a sentence reduction and appointed counsel for Llewlyn. The district court denied

Llewlyn's motion for reconsideration on February 9, 2016. Llewlyn filed a notice of appeal fourteen days later.

II.

The United States contends, as a threshold matter, that the instant appeal is untimely and must be dismissed. Generally, a notice of appeal in a criminal case must be filed within fourteen days after entry of the order or judgment being appealed. Fed. R. App. P. 4(b)(1)(A). Within five days of the district court's denial of Llewlyn's initial motion for a sentence reduction, he filed a "traverse," which the court construed as a motion to reconsider. A timely-filed motion for reconsideration may toll the time for filing a notice of appeal. *See United States v. Dieter*, 429 U.S. 6, 8-9, 97 S. Ct. 18, 19-20, 50 L. Ed. 2d 8 (1976); *United States v. Cerceda*, 172 F.3d 806, 811 n.3 (11th Cir. 1999) (en banc) (holding that the government's timely motion for reconsideration in a criminal case stopped the time for filing an appeal). But the government maintains that Llewlyn's traverse was actually a motion to correct or reduce a sentence under Rule 35 of the Federal Rules of Criminal Procedure, which does not suspend the deadline for filing a notice of appeal. *See Fed. R. Crim. P. 35*; *Fed. R. App. P. 4(b)(5)*. We review these issues *de novo*. *United States v. Phillips*, 597 F.3d 1190, 1194 n.9 (11th Cir. 2010).

Rule 35(a) permits a district court to "correct a sentence that resulted from

arithmetical, technical, or other clear error” within fourteen days after sentencing. This rule applies not only to original sentencing proceedings, but also to resentencings under 18 U.S.C. § 3582(c)(2). *United States v. Caraballo-Martinez*, 866 F.3d 1233, 1241 (11th Cir. 2017) (citing *Phillips*, 597 F.3d at 1196). However, not all motions under § 3582(c)(2) result in resentencings.

The classic example of a § 3582(c)(2) ruling on the merits occurs when a district court determines that a defendant is eligible for a sentence reduction because the applicable guidelines range has been lowered; the court has analyzed the § 3553(a) factors; and the defendant is resentenced to a lesser term of imprisonment. *See Phillips*, 597 F.3d at 1198-99. There is no question in such instances that, because the defendant has been resentenced, Rule 35(a) would apply to a motion for reconsideration of the sentence. *See id.*

Here, the district court denied Llewlyn’s motion for a sentence reduction and did not pronounce a sentence. Instead, it issued a one-page AO 247 form, which states simply: “Motion is Denied as moot. Defendant has already completed serving his sentence in this case.” Accordingly, Rule 35(a) is not implicated. *See Caraballo-Martinez*, 866 F.3d at 1242-45 (Rule 35 does not apply where no resentencing has taken place). Llewlyn’s motion to reconsider, filed five days after the denial of his motion for a sentence reduction, tolled the time for filing a notice of appeal. His notice of appeal was filed within fourteen days of the order denying

the motion for reconsideration and, therefore, was timely. *See* Fed. R. App. P. 4(b).

III.

Llewlyn appeals the district court's denial of his motion for reconsideration. The denial of such a motion is generally reviewed for abuse of discretion. *United States v. Simms*, 385 F.3d 1347, 1356 (11th Cir. 2004). However, we review *de novo* both the district court's determination that a defendant is not eligible for a sentence reduction, *United States v. Glover*, 686 F.3d 1203, 1206 (11th Cir. 2012), and its conclusions regarding the scope of its legal authority under § 3582(c)(2). *United States v. James*, 548 F.3d 983, 984 (11th Cir. 2008) (per curiam).

Generally, a district court may not modify a term of imprisonment once it has been imposed, except under the circumstances outlined in § 3582(c). *United States v. Mills*, 613 F.3d 1070, 1075 (11th Cir. 2010). One applicable exception occurs when a “defendant [] 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). In such instances, 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.” *Id.* Sentencing Guidelines § 1B1.10(b)(2)(C) provides the following policy statement:

“[I]n no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.”

The Florida district court concluded that it was without authority to reduce Llewlyn’s sentence because doing so would be inconsistent with the prohibition in § 1B1.10. We agree. First, the Florida sentence was imposed in September 2000, when no other federal sentence existed. Llewlyn necessarily began serving this sentence before the North Carolina sentence, which was imposed in July 2001. Second, Llewlyn had already completed his 110-month Florida sentence when Amendment 782 was promulgated in 2014, and he had received a 57-month reduction of his North Carolina sentence based on the amendment in January 2016.

Llewlyn maintains that our analysis is incorrect because his two consecutive federal sentences are aggregated and he is actually serving a single sentence. He contends that “term,” as used in U.S.S.G. § 1B1.10, means “aggregate term,” in the case of consecutive sentences. However, we give guidelines language its plain and ordinary meaning. *United States v. Hall*, 704 F.3d 1317, 1321 (11th Cir. 2013) (citing *Bailey v. United States*, 516 U.S. 137, 145, 116 S. Ct. 501, 506, 133 L. Ed. 2d 472 (1995)). Each district court sentenced Llewlyn to a distinct period of incarceration, and the second sentencing judge explicitly directed that Llewlyn serve the 360-month term consecutively to any previously-imposed sentence. Llewlyn’s suggested interpretation would render the concept of “consecutive

sentences” imposed at different times meaningless. We will not rewrite the guidelines by reading them more broadly than the plain language indicates. *Id.* at 1321-22 (citing *United States v. Fulford*, 662 F.3d 1174, 1178 (11th Cir. 2011)).

Llewlyn also relies heavily on 18 U.S.C. § 3584(c), which provides that multiple terms of imprisonment “shall be treated *for administrative purposes* as a single, aggregate term of imprisonment.” 18 U.S.C. § 3584(c) (emphasis added). But district courts’ judicial decisions under § 3582 do not constitute an “administrative purpose.” This language instead refers to the Bureau of Prisons’ administrative duties, such as computing inmates’ credit for time served. *See United States v. Vaughn*, 806 F.3d 640, 643-44 (1st Cir. 2015) (“After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for *administering* the sentence.” (quoting *United States v. Wilson*, 503 U.S. 329, 335, 112 S. Ct. 1351, 1355, 117 L. Ed. 2d 593 (1992))); *see also United States v. Zoran*, 682 F.3d 1060, 1062 n.2 (8th Cir. 2012) (noting that § 3584(c) “merely instructs the Bureau of Prisons in administering sentences”). We also note that every other circuit to have considered similar arguments has rejected them. *See United States v. Chapple*, 847 F.3d 227, 230 (5th Cir. 2017); *Vaughn*, 806 F.3d at 643-44; *United States v. Parker*, 472 F. App’x 415, 417 (7th Cir. 2012); *United States v. Gamble*, 572 F.3d 472, 474 (8th Cir. 2009).

As the United States Court of Appeals for the First Circuit pointed out in

Vaughn, extending § 3584(c) to this situation would “essentially rewrite the statute to extend aggregation to *all* purposes.” 806 F.3d at 644 (emphasis in original). We agree with *Vaughn*’s reasoning and decline to adopt such a broad reading of the statute. *See Parker*, 472 F. App’x at 417 (concluding that consecutive sentences may be aggregated by the BOP for administrative purposes, but remain “distinct terms of imprisonment” imposed for separate convictions).

Llewlyn finds support, by analogy, in Supreme Court habeas cases involving the “in custody” requirement. For example, in *Peyton v. Rowe*, 391 U.S. 54, 67, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968), the Court held that a district court may entertain a habeas petition from a prisoner incarcerated under consecutive sentences when the prisoner claims that a sentence that he is scheduled to serve in the future is unconstitutional. Nearly thirty years later, the Supreme Court decided *Garlotte v. Fordice*, 515 U.S. 39, 41, 115 S. Ct. 1948, 1949, 132 L. Ed. 2d 36 (1995), which it described as “*Peyton* in reverse.” *Garlotte* entered simultaneous guilty pleas in state court and was sentenced to three years’ imprisonment for a drug charge, to be followed by concurrent life sentences for murder convictions. *Id.* at 41-42. Although *Garlotte* had completed the three-year term and had begun serving the life sentences for the murder charge, the Supreme Court authorized his habeas petition which challenged the validity of his plea regarding the drug charge. The Court ultimately concluded that “a prisoner serving consecutive sentences is

‘in custody’ under any one of them for purposes of the habeas statute.” *Id.* at 45-46 (quoting *Peyton*, 391 U.S. at 67). Nothing on the face of the habeas statute militated against an interpretation which viewed Garlotte as being in custody under the aggregate of the consecutive sentences imposed. *Id.* at 46. The Court focused on the “core purpose of habeas review,” noting that Garlotte’s challenge would shorten his term of incarceration if he was able to prove unconstitutionality. *Id.* at 47. Accordingly, for habeas purposes, sentences are viewed “in the aggregate, not as discrete segments.” *Id.*

The holdings of these cases do not extend to motions brought under § 3582(c)(2). Unlike the habeas provisions, the plain language of § 3584(c) and U.S.S.G. § 1B1.10(b)(2)(C) provides a basis for rejecting aggregation. Additionally, the habeas statutes serve purposes very different than those of § 3582(c)(2). *See* 28 U.S.C. § 2241(c)(3); *see also* 28 U.S.C. §§ 2254(a), 2255(a). Title 28 of the United States Code, § 2255, provides prisoners serving federal sentences with a mechanism to challenge a sentence that the prisoner claims was imposed in violation of the Constitution or laws of the United States. Section 3582(c)(2), on the other hand, provides a vehicle “through which *appropriately sentenced* prisoners can urge the court to exercise leniency to give certain defendants the benefits of an amendment to the Guidelines.” *United States v.*

Webb, 565 F.3d 789, 794 (11th Cir. 2009) (emphasis added) (quoting *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995)).

Further, the relief available under these statutes is markedly different. It has long been held that district courts have “broad discretion in conditioning a judgment granting habeas relief. Federal courts are authorized, under 28 U.S.C. § 2243, to dispose of habeas corpus matters ‘as law and justice require.’” *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S. Ct. 2113, 2118, 95 L. Ed. 2d 724 (1987). A court may vacate and set aside the judgment, resentence the defendant, grant a new trial, or correct the sentence as it sees fit. Accordingly, the “in custody” requirement has received a liberal interpretation in the habeas context “that may be fairly viewed as sui generis.” *Vaughn*, 806 F.3d at 645. In contrast, § 3582 gives a district court very limited authority to modify a sentence and provides a “narrow exception to the rule of finality.” *Dillon v. United States*, 560 U.S. 817, 827, 130 S. Ct. 2683, 2692, 177 L. Ed. 2d 271 (2010); see *Phillips*, 597 F.3d at 1194-95 (“The authority of a district court to modify an imprisonment sentence is narrowly limited by statute.”). For these reasons, we decline to read “term of imprisonment” under § 3582 as equivalent to “in custody,” as that phrase is understood in the context of habeas jurisprudence.

Llewlyn also relies on case law from district courts and other circuits in support of his argument that the Florida district court had authority to reduce his

sentence after he had “nominally” completed the term of imprisonment. He places significant emphasis on the unpublished case of *United States v. Clarke*, 499 F. App’x 579 (7th Cir. 2012), and similar district court cases. Clarke was convicted of three counts of distributing cocaine base and sentenced to 151 months’ imprisonment for his drug-related convictions. *Id.* at 580-81. He also was convicted of carrying a firearm in relation to a drug trafficking offense and sentenced to a mandatory 60-month consecutive sentence under 18 U.S.C. § 924(c). *Id.* Clarke subsequently filed a motion for a sentence reduction based on lowered guidelines ranges for crack-cocaine offenses. *Id.* at 581. Although the motion was filed after Clarke had completed the portion of his sentence attributable to the drug convictions, the Seventh Circuit determined that the motion was not moot and should be resolved on the merits. *Id.* at 582.

In suggesting that Clarke was eligible for a sentence reduction under the crack-cocaine amendments, the Seventh Circuit remarked that a sentence reduction would result in Clarke being released from prison earlier. *Id.* Notably, Clarke’s consecutive crack-cocaine and gun sentences were imposed at the same time, and the convictions arose out of the same course of conduct. *Id.* at 580. The court concluded, without explanation, that Clarke was under a “single, aggregate term” of imprisonment under 18 U.S.C. § 3584(c). *Id.* at 582. But as we previously

explained, Llewlyn's motion for a sentence reduction does not implicate an administrative purpose as contemplated under that provision.

It is notable that the non-habeas cases upon which Llewlyn relies involve mandatory consecutive tack-on sentences for firearms offenses under 18 U.S.C. § 924(c). *See Clarke*, 499 F. App'x at 579; *United States v. Kaman*, No. 3:09-cr-141, 2015 WL 2226213, at *1-2 (E.D. Tenn. May 12, 2015); *United States v. Brown*, No. 2:04-cr-00088, 2013 WL 1819795, at *5-6 (W.D. Penn. Apr. 29, 2013); *United States v. Wilkerson*, No. 00-cr-10426, 2010 WL 5437225, at *1-2 (D. Mass. Dec. 23, 2010); *United States v. Martin*, 602 F. Supp. 2d 611, 614-15 (E.D. Penn. 2009); *United States v. Bolin*, No. 2:02-cr-176-1, 2008 WL 928397 at *2 (S.D. Ohio Apr. 7, 2008). Although not explicit in the cases, it appears to us that these courts have concluded that the substantive drug convictions are so intertwined with the § 924(c) charges that the consecutive sentences should be viewed in the aggregate when it comes to considering motions under § 3582(c). In other words, the particular defendants should not be "deprived of a sentence reduction simply because they [have] already served the portion of the combined sentence attributable to their drug offenses." *Bolin*, 2008 WL 928397, at *2. And in that situation, it may not matter which of the two sentences is served "first."

While Llewlyn contends that these cases are "structurally similar" to the case at bar, they are distinguishable in critical ways. Each case involved a single

proceeding in which the defendant was convicted of, and sentenced consecutively for, a drug offense and a related firearms charge under § 924(c). Llewlyn, on the other hand, was sentenced in different courts, at different times, and for unrelated crimes. Accordingly, there is no practical reason for combining the sentences. Llewlyn has identified no fairness concern, since there is no mistaking the order in which the sentences were imposed. *See Vaughn*, 806 F.3d at 644 (“There is no [] fairness concern when, as here, a defendant commits a crime while incarcerated and receives an additional consecutive sentence while he is already serving the first sentence.”).

Accordingly, the cases involving statutory mandatory consecutive sentences are not persuasive with respect to unrelated sentences like Llewlyn’s. We need not, and do not, decide whether sentences may be aggregated when a statutory mandatory consecutive sentence and a guidelines sentence are imposed in the same proceeding.

Llewlyn also maintains that courts have no authority to determine the order in which consecutive sentences will be served. However, there is no doubt that a sentencing judge may impose a consecutive sentence when a defendant is already subject to an undischarged term of imprisonment. *See United States v. Bradford*, 277 F.3d 1311, 1316-17 (11th Cir. 2002) (citing 18 U.S.C. § 3584(a)); *see also* U.S.S.G. § 5G1.3(c). The North Carolina district court did just that, with

Llewlyn's previously-imposed 110-month Florida sentence in mind. After Llewlyn completed the 110-month sentence, the North Carolina district court granted two significant reductions of the sentence that it had imposed based on Llewlyn's motions under § 3582(c)(2). A reduction of Llewlyn's first Florida sentence after its completion would not only violate U.S.S.G. § 1B1.10, but might allow one court to indirectly interfere with the sentencing decisions of another.

IV.

Like *Vaughn*, this appeal is “about two separate and independent federal crimes, committed at separate times and sentenced separately by two different judges.” 806 F.3d at 641. Because Llewlyn has already served the entirety of his otherwise eligible sentence, he is ineligible for a sentence reduction pursuant to § 3582(c)(2). The district court's denial of Llewlyn's motion for reconsideration is **AFFIRMED**.

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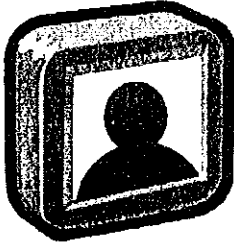
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 00-cr-6022-MIDDLEBROOKS

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES LLEWLYN,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO RECONSIDER THE
COURT'S ORDER DENYING MOTION TO REDUCE SENTENCE**

THIS CAUSE comes before the Court upon Defendant's *Pro Se* Traverse to Government's Response (DE 318), filed on November 18, 2014, and Motion to Construe Defendant's Traverse to Respondent's Motion as a Motion to Reconsider (DE 320), filed on February 19, 2015. The Court construes Defendant's *Pro Se* Traverse (DE 318) as a Motion to Reconsider ("Motion") the Court's Order Denying Motion to Reduce Sentence (DE 317). For the reasons that follow, Defendant's Motion is denied.

I. Background

On September 28, 2000, I sentenced Defendant to 110 months' imprisonment for his conviction of conspiracy to possess cocaine with the intent to distribute. (The "First Term") (DE 168). On August 6, 2001, while serving the First Term, Defendant was subsequently sentenced by Judge Lacy Thornburg in the Western District of North Carolina to a 360-month term of imprisonment for a separate conviction of conspiracy to possess cocaine with the intent to distribute, to be served consecutive to the First Term. (The "Second Term") (DE 324-1 at 2).

On November 4, 2014, Defendant filed a Motion for Reduction of Sentence, seeking a reduction of the First Term under 18 U.S.C. § 3582(c)(2) based on Retroactive Amendment 782 ("Motion"). (DE 314). The Government objected, contending that because Defendant had completed the First Term and was currently serving the Second Term, the Motion should "be dismissed for lack of jurisdiction or denied as moot." (DE 316 at 2). I entered an Order denying the Motion. (DE 317). Defendant then filed a traverse to the Government's Response, citing *Garlotte v. Fordice*, 515 U.S. 39 (1995), in support of his argument that his two consecutive sentences should be considered one "aggregate" sentence for the purpose of a § 3582(c)(2) reduction. (DE 318). After I appointed counsel for Defendant on March 5, 2015 (DE 321), Defendant filed a Memorandum in Support of the Reduction on November 11, 2015 (DE 323). The Government responded on November 16, 2015, and Defendant replied on November 20, 2015. (DE 325).

II. Legal Standard

"Section 3582(c)(2) permits a district court to reduce the sentence 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.'" *United States v. Hamilton*, 715 F.3d 328, 336-37 (11th Cir. 2013). The statute was enacted "to remedy systemic injustice." *Freeman v. United States*, 131 S. Ct. 2685, 2695 (2011). Defendant bears the burden of establishing the retroactive amendment has lowered his guidelines range. *United States v. Green*, 764 F.3d 1352, 1355-56 (11th Cir. 2014).

"A district court may modify a term of imprisonment," under 18 U.S.C. § 3582(c)(2), "if an amendment to the Guidelines lowers the guideline range that governed the sentence, so long as the reduction is consistent with applicable policy statements issued by the United States

Sentencing Commission.” *Hamilton*, 715 F.3d at 337 (internal quotations omitted). The United States Sentencing Guidelines Manual § 1B1.10 (“U.S.S.G. § 1B1.10”) lists the amendments made retroactively applicable, as well as the Sentencing Commission’s applicable policy statements. *See id.*

When applying a reduction, “all original sentencing determinations remain unchanged with the sole exception of the guideline range that has been amended since the original sentencing.” *United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000).

III. Discussion

Defendant seeks a reduction of his sentence based on Retroactive Amendment 782 (“Amendment 782”), which retroactively reduces the base offense level for many drug offenses. The Government does not contest that Defendant would benefit by application of Amendment 782 because he was sentenced for possession with intent to distribute cocaine under a base offense that has since been reduced by two levels. However, since I sentenced Defendant to 110 months on September 28, 2000, Defendant has served more than 110 months. The Government argues Defendant is not eligible for a reduction of the First Term because he has fully served that sentence.

Section 3582(c) governs a modification of a term of imprisonment. It provides:

the court may reduce the term of imprisonment, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). U.S.S.G. § 1B1.10 provides the applicable policy statements that a district court must follow under § 3582(c)(2). One provision of § 1B1.10 provides:

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

U.S.S.G. § 1B1.10(b)(2)(C). Section 3582(c) does not define whether a “term of imprisonment” refers to consecutive terms separately or in the aggregate. Thus, the issue before the Court is whether 18 U.S.C. § 3582(c)(2) treats consecutive sentences, imposed by separate federal courts for separate convictions, as one aggregate sentence for purposes of determining eligibility for reduction.

A. The Parties’ Positions

Defendant contends his First and Second Term form one aggregate sentence. He first notes that, because § 3582(c)(2) is a remedial statute, it should be construed liberally. (DE 323 at 2). Defendant argues that under 18 U.S.C. § 3584, “[m]ultiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.” (DE 323 at 2-3) (quoting 18 U.S.C. § 3584(c)). Defendant cites two courts that have treated consecutive sentences as one aggregate term under § 3582(c)(2). (DE 323 at 2-3). Defendant also analogizes to the habeas context in *Garlotte*, where the Supreme Court held that, because the habeas “in custody” requirement views consecutive sentences in the aggregate, a defendant is considered “in custody” in a habeas challenge to the first sentence, even when that sentence has expired and the defendant is serving the second consecutive sentence. 515 U.S. at 47.

In response, the Government cites U.S.S.G. § 1B1.10’s mandate, which states “[i]n no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.” U.S.S.G. § 1B1.10(b)(2)(C). The Government cites two Circuit Court cases that held a defendant is no longer eligible for reduction of a first sentence once a defendant has completed the first of two consecutive sentences. (DE 324 at 3-4).

The Government argues that the cases to which Defendant cites—*Clarke* and *Bolin*—are distinguishable because they involve sentence reductions applied to consecutive sentences imposed in the same case at the same time. (DE 324 at 4). Finally, the Government argues that the reasoning in *Garlotte* is inapplicable as it involved rights protected by the Constitution, not merely a sentencing statute. Accordingly, the Government argues there are significant limitations to the Court's authority to reduce sentences, especially in light of U.S.S.G. § 1B1.10(b)(2)(C), which precludes reduction in this case.

In reply, Defendant argues there is no significance to the distinction that the two sentences were separately imposed, citing the lack of significance of separately imposed sentences in the habeas context. (DE 325 at 1) (citing *Maleng v. Cook*, 490 U.S. 488 (1989)). He contends that *Garlotte* was also an issue of statutory interpretation (definition of “in custody”) and therefore *Garlotte* is analogous. (DE 325 at 2). Defendant also contends that the prohibition in § 1B1.10(b)(2)(C) is inapplicable as it is located in the subsection dealing with determining the level of reduction, not eligibility. (DE 325 at 3). Finally, he argues that if the “term of imprisonment” is defined as the aggregate term, then the prohibition would not apply, as Defendant has not served the full aggregate term. (DE 325 at 3).

B. Application of “Term of Imprisonment” to Consecutive Terms

A survey of the relevant case law from other circuits¹ indicates that when consecutive terms are imposed by separate judges at separate times, there is no ambiguity as to which term of imprisonment began running first. In those circumstances, two terms of imprisonment are not aggregated for purposes of § 3582(c)(2). In *Gamble*, the defendant was sentenced for a crack

¹ The Parties both cite persuasive authority to support their propositions. The Eleventh Circuit, however, has not reached the issue of whether consecutive sentences—either imposed by separate judges at separate times or by the same judge at the same time—are treated as one aggregate term of imprisonment under § 3582(c)(2).

cocaine conviction in 2002, which, excluding time for good credit, Defendant would complete by 2006. *United States v. Gamble*, 572 F.3d 472, 472 (8th Cir. 2009). However, while serving that sentence, the defendant was convicted of conspiracy to distribute marijuana and conspiracy to “money launder” and sentenced to a second term. *Id.* at 473. In 2008, the defendant sought a reduction of the term of imprisonment based on his 2002 conviction, which, by that time, defendant had completely served. *Id.* The Eighth Circuit rejected the defendant’s argument that the two terms were aggregated, noting “there is no mistaking the order of the sentences.” *Id.* at 474. The Eighth Circuit, therefore, held that pursuant to § 1B1.10(b)(2)(C), the defendant was ineligible for a sentence reduction of the first term. *Id.* at 474-75.

Similarly, in *Parker*, the defendant had been sentenced in 1990 for a conviction of possession of crack cocaine and heroin with intent to distribute. *United States v. Parker*, 472 F. App’x 415 (7th Cir. 2012). Subsequently, in 1993, he was sentenced to a consecutive term for a cocaine conviction, based on acts conducted while he was already incarcerated for the 1990 conviction. *Id.* at 416. The defendant sought to reduce the 1990 sentence. *Id.* The Seventh Circuit held he was ineligible for a reduction, saying his 1990 sentence had run first and had been fully served. *Id.* at 417. Because the 1990 sentence could not be reduced below the amount already served, the Seventh Circuit denied the reduction. *Id.*

The Government correctly notes that Defendant cites cases that are inapplicable to the instant case. Both cases on which Defendant relies involved sentences that were imposed at the same time by the same judge. In *Clarke*—which like *Parker*, was a Seventh Circuit case—the defendant was sentenced at the same time to 151 months for multiple drug-related convictions and 60 months for a gun conviction to be served consecutively under § 924(c). *United States v. Clarke*, 499 F. App’x 579, 580-81 (7th Cir. 2012). After more than 151 months had passed since

the sentences were imposed, Defendant sought a reduction for the drug convictions under § 3582(c). *Id.* In *Clarke*, unlike in *Parker*, the Seventh Circuit found the defendant was eligible for a reduction, citing the fact that the defendant was sentenced at the same time to the consecutive sentences. *Id.* at 582.² Likewise, in *Bolin*, the Government argued that, because defendant had completed a sentence for a drug trafficking conviction and was currently serving a consecutive sentence for a firearm conviction, the defendant was ineligible for a reduction as to the drug trafficking conviction. *United States v. Bolin*, No. 2:02-CR-176-1, 2008 WL 928397, at *1 (S.D. Ohio Apr. 7, 2008). The two sentences had been simultaneously imposed. *Id.* There, the District Court in the Southern District of Ohio noted that the original judgment did not specify which term was slated to run first. *Id.* at *2. The court in *Bolin* held that the defendant's terms should be treated in the aggregate and that the defendant was still eligible to reduce his sentence for his drug conviction. *Id.* at *3. Both cases on which Defendant cites are instances where courts relied on the fact that the consecutive sentences were imposed at the same time—an aspect missing from the instant case.

Defendant does not cite any case—and the Court is unaware of any—in which consecutive terms, imposed at different times by different judges, have been treated in the aggregate under § 3582(c)(2). The Seventh Circuit, having encountered this issue both in the context of simultaneously and separately imposed sentences (*Clarke* and *Parker*), treated terms in the aggregate in the former but not the latter. Thus, the case law demonstrates that where, as here, the sentences are imposed separately by separate judges, there is no ambiguity as to which term began running first, and the terms are not treated in the aggregate under § 3582(c)(2).

² *Clarke*—which was decided eight months later—did not cite *Parker*.

This reading of the cases is supported by a recent case from the First Circuit. In *Vaughn*, the First Circuit addressed the exact issue before the Court—whether consecutive sentences are treated in the aggregate for reductions under § 3582(c)(2) when the terms were separately imposed. *United States v. Vaughn*, 806 F.3d 640, 641-43 (1st Cir. 2015). There, as here, a defendant was sentenced by two judges for two separate convictions. *Id.* The defendant sought to reduce the earlier imposed sentence under § 3582(c)(2). *Id.* The First Circuit found that, since the defendant had served the entirety of his first sentence, he was not eligible for a reduction under § 1B1.10(b)(2)(C). *Id.* In doing so, the First Circuit rejected the same argument made by Defendant—that the language of § 3584(c) indicates two terms are aggregated for purposes of calculating reductions. *Id.* This was because a sentence reduction under § 3582(c)(2) “involves discretionary decision-making by the district court and cannot be described as administrative.” *Id.* at 644. The First Circuit found that applying § 3584(c) to the § 3582(c)(2) context would be to “extend aggregation to *all* purposes.” *Id.* The First Circuit did, however, note that “[s]imultaneously imposed consecutive sentences . . . often do not make clear in what order the sentences should be served.” Citing “fairness concerns,” the First Circuit left open the question of whether simultaneously imposed consecutive sentences might be treated in the aggregate under § 3582(c)(2). *Id.*³

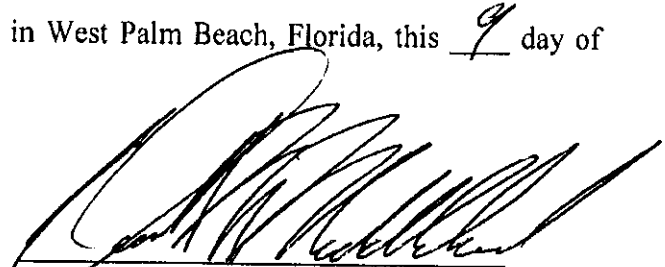
Recognizing that simultaneously imposed consecutive sentences might be considered in the aggregate, that issue is not before the Court. Here, the First Term was imposed on September 28, 2000. The First Term ran for almost a year before Defendant was sentenced to the Second

³ In addition, Defendant’s reliance on *Garlotte* is misplaced. As the First Circuit explained in *Vaughn*, it is unclear whether the Supreme Court’s decision in *Garlotte* applies to separately imposed consecutive sentences. *Vaughn*, 806 F.3d at 645 (citing *Garlotte* 515 U.S. at 41-42). Moreover, “[e]ven if *Garlotte* does apply to separately imposed consecutive sentences, federal habeas is a unique context and the ‘in custody’ requirement has traditionally received a liberal construction that may be fairly viewed as *sui generis*.” *Id.*

Term (in 2001), which was to run consecutive to the First Term. The First Term had been fully served by, at the latest, November 28, 2009. Although I am inclined to grant a reduction in Defendant's case, under U.S.S.G. § 1B1.10(b)(2)(C), I cannot reduce his sentence below the amount already served. Here, there is no question that the First Term began running in 2000 and has been fully served. Defendant may not receive a reduction below that amount.⁴ Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Construe Defendant's Traverse to Respondent's Motion as a Motion to Reconsider (DE 320) is **GRANTED**. Defendant's Pro Se Traverse to Government's Response, construed as a Motion to Reconsider (DE 318), is **DENIED**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 9 day of February, 2016.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record;
Charles Llewlyn a/k/a Owen Odman
60206-004
Federal Correction Institution
2650 Highway 3015
Jessup, GA 31599

⁴ I do, however, encourage Defendant to continue in his attempt for a reduction of his sentence imposed in 2001 by the U.S. District Court for the Western District of North Carolina.

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

United States of America

v.

CHARLES LLEWLYN

Date of Original Judgment: 09/27/2000

Date of Previous Amended Judgment: _____

(Use Date of Last Amended Judgment if Any)

Case No: 00-6022-CR-MIDDLEBROOKS

USM No: 60206-004

PRO SE

Defendant's Attorney

ORDER REGARDING MOTION FOR SENTENCE REDUCTION
PURSUANT TO 18 U.S.C. § 3582(c)(2)

Upon motion of ☒ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion, and taking into account the policy statement set forth at USSG §1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable,

IT IS ORDERED that the motion is:

☒ DENIED. ☐ GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of _____ months is reduced to _____.

(Complete Parts I and II of Page 2 when motion is granted)

Motion is Denied as moot. Defendant has already completed serving his sentence in this case.

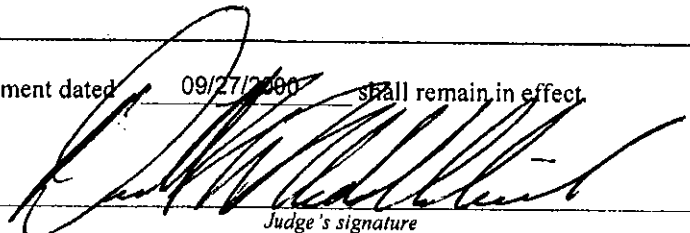
Except as otherwise provided, all provisions of the judgment dated 09/27/2000 shall remain in effect.

IT IS SO ORDERED.

Order Date: 11/13/14

Effective Date: _____

(if different from order date)


Judge's signature

Donald M. Middlebrooks, U.S. District Judge

Printed name and title