United States of America v. Arellano (Ramirez) Doc. 205251007

15-2570-cr
United States v. Ferney Dario Ramirez

1 In the
2 United States Court of Appeals
3 For the Second Circuit
4
5
6 August Term, 2016
7 No. 15-2570-cr
8
9 UNITED STATES OF AMERICA,
10 *Appellee,*
11
12 *v.*
13
14 FERNEY DARIO RAMIREZ,
15 *Defendant-Appellant,*
16
17 FREDDY ARELLANO,
18 *Defendant.*[*]
19
20
21 Appeal from the United States District Court
22 for the Southern District of New York.
23 No. 1:03-cr-1104-2 — John G. Koeltl, *Judge.*
24

[*] The Clerk of Court is directed to amend the caption as set forth above.

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1
2 ARGUED: SEPTEMBER 2, 2016
3 DECIDED: JANUARY 25, 2017
4 ________________________
5
6 Before: RAGGI, CHIN, and DRONEY, *Circuit Judges*.
7 ________________________
8
9 Appeal from a final order of the United States District Court
10 for the Southern District of New York (Koeltl, *J.*), denying Ramirez's
11 motion for a reduction in sentence under 18 U.S.C. § 3582(c)(2).
12 Ramirez argues that the district court's denial violated the *Ex Post*
13 *Facto* Clause. We **AFFIRM**.
14 ________________________
15
16 YELENA KONANOVA (Sanford I.
17 Weisburst, *on the brief*), Quinn
18 Emanuel Urquhart & Sullivan, LLP,
19 New York, New York, *for Defendant-*
20 *Appellant Ferney Dario Ramirez*.
21
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23 States Attorney (Margaret Garnett,
24 Assistant United States Attorney, *on*
25 *the brief*), *for* Preet Bharara, United
26 States Attorney for the Southern
27 District of New York, New York,
28 New York, *for Appellee*.
29
30

31

1 DRONEY, *Circuit Judge*:

2 In May 2004, Defendant-Appellant Ferney Dario Ramirez
3 pleaded guilty to one count of conspiracy to distribute five
4 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 and
5 841(a)(1), (b)(1)(A). The district court calculated Ramirez's
6 Guidelines range as 360 months' to life imprisonment, and
7 sentenced Ramirez to a term of 210 months' imprisonment. In 2015,
8 Ramirez moved for a reduction in sentence pursuant to 18 U.S.C.
9 § 3582(c)(2), arguing that Amendments 782 and 788 of the
10 Sentencing Guidelines lowered his applicable Guidelines range. The
11 district court acknowledged that Amendment 782 reduced
12 Ramirez's Guidelines range to 324 to 405 months' imprisonment but
13 denied the motion because a 2011 Amendment to U.S.S.G.
14 § 1B1.10(b) prohibited a sentence reduction where the defendant's
15 initial sentence was below the minimum of the amended Guidelines
16 range. On appeal, Ramirez argues that application of § 1B1.10(b) to

1 prohibit a sentence reduction violates the *Ex Post Facto* Clause of the
2 United States Constitution. We affirm the district court's order.

3 **BACKGROUND**

4 A. Initial Sentencing

5 On September 16, 2003, Ramirez was charged in a one-count
6 indictment with conspiracy to possess with intent to distribute five
7 kilograms or more of cocaine. On May 6, 2004, Ramirez pleaded
8 guilty pursuant to a plea agreement that stipulated to a Guidelines
9 range of 151 to 188 months' imprisonment. Prior to sentencing,
10 however, Ramirez made a motion to withdraw from his plea
11 agreement in light of *United States v. Booker*, 543 U.S. 220 (2005), so
12 that he could argue for a sentence below the range stipulated in the
13 plea agreement.[1] The district court granted the motion and held a
14 *Fatico* hearing on March 30, 2006, to resolve factual disputes between
15 the parties regarding, *inter alia*, the amount of drugs involved and

[1] Ramirez still maintained his guilty plea to the drug conspiracy.

1 Ramirez's acceptance of responsibility, ultimately concluding that
2 more than 150 kilograms of cocaine were involved in the offense and
3 that Ramirez was not entitled to credit for acceptance of
4 responsibility.

5 The district court proceeded to sentencing on May 25, 2006.
6 Pursuant to U.S.S.G. § 2D1.1(c)(1), the district court calculated a base
7 offense level of 38 based on the quantity of drugs involved in the
8 offense. The district court applied a two-level enhancement under
9 U.S.S.G. § 3B1.1 because Ramirez was an organizer, leader, or
10 supervisor of the criminal activity, and another two-level
11 enhancement under U.S.S.G. § 3C1.1 because Ramirez attempted to
12 obstruct justice by influencing a witness. After refusing to grant
13 various downward departures sought by Ramirez, the court
14 calculated his adjusted offense level as 42. Given Ramirez's criminal

1 history category of II, the district court determined that the
2 applicable Guidelines range was 360 months' to life imprisonment.[2]
3 The district court noted that the situation was "highly
4 unusual" because the parties had initially stipulated to a 151-to-188-
5 month Guidelines range before Ramirez withdrew from the plea
6 agreement. Joint App'x at 74–75. The court also acknowledged that,
7 despite his withdrawal from the plea agreement, Ramirez's guilty
8 plea "did in fact save the government and the public substantial
9 resources." *Id*. at 75. After considering the 18 U.S.C. § 3553(a) factors,
10 the district court imposed a below-Guidelines sentence of 210
11 months' imprisonment, followed by five years of supervised release.
12 Ramirez subsequently appealed his conviction and sentence,
13 arguing that the district court erred in granting his motion to
14 withdraw from the plea agreement and that his counsel was
15 ineffective for advising him to withdraw. We affirmed the district

[2] Ramirez was subject to a mandatory minimum sentence of incarceration of ten years under 21 U.S.C. §§ 846 and 841(b)(1)(A).

1 court's judgment and dismissed Ramirez's ineffective-assistance
2 claim without prejudice. *See United States v. Ramirez*, 267 F. App'x 11,
3 11, 13 (2d Cir. 2008) (summary order). On May 6, 2011, the district
4 court denied Ramirez's motion to vacate, set aside, or correct his
5 sentence under 28 U.S.C. § 2255. *See Ramirez v. United States*, No. 09-
6 cv-4397 (S.D.N.Y. May 6, 2011), ECF No. 9. We denied a Certificate
7 of Appealability and dismissed Ramirez's subsequent appeal.
8 *Ramirez v. United States*, No. 11-2843 (2d Cir. Feb. 22, 2012), ECF No.
9 37.

10 B. Subsequent Changes in the Sentencing Guidelines

11 Under the 2002 Sentencing Guidelines in effect at the time of
12 Ramirez's offense, as well as the 2005 Guidelines in effect when
13 Ramirez was sentenced, district courts could generally reduce
14 sentences in sentence-modification proceedings even where the
15 initial sentence was below the low-end of the amended Guidelines
16 range:

1 In determining whether, and to what extent, a reduction
2 in the term of imprisonment is warranted for a
3 defendant eligible for consideration under 18 U.S.C.
4 § 3582(c)(2), the court should consider the term of
5 imprisonment that it would have imposed had the
6 amendment(s) to the guidelines listed in subsection (c)
7 been in effect at the time the defendant was sentenced,
8 except that in no event may the reduced term of
9 imprisonment be less than the term of imprisonment
10 the defendant has already served.

11 U.S.S.G. § 1B1.10(b) (2002 ed.); *accord id.* § 1B1.10(b) (2005 ed.).[3] In
12 addition, the Application Notes to that section confirmed that "the
13 sentencing court has the discretion to determine whether, and to
14 what extent, to reduce a term of imprisonment under this section."
15 *Id.* § 1B1.10(b) cmt. n.3 (2002 ed.); *id.* § 1B1.10(b) cmt. n.3 (2005 ed.).

16 In 2011, the Sentencing Commission adopted Amendment
17 759. That amendment prohibited district courts from imposing a
18 reduced sentence that is below the minimum of the amended
19 Guidelines range, unless the Government originally moved for a

[3] A district court's discretion to reduce a sentence is subject to statutory mandatory minimum sentences. *See United States v. Johnson*, 732 F.3d 109, 114–15 (2d Cir. 2013).

1 below-Guidelines sentence due to the defendant's substantial
2 assistance to the authorities under U.S.S.G. § 5K1.1:

> 3 (A) Limitation.—Except as provided in subdivision (B),
> 4 the court shall not reduce the defendant's term of
> 5 imprisonment under 18 U.S.C. § 3582(c)(2) and this
> 6 policy statement to a term that is less than the minimum
> 7 of the amended guideline range determined under
> 8 subdivision (1) of this subsection.
> 9
> 10 (B) Exception for Substantial Assistance.—If the term of
> 11 imprisonment imposed was less than the term of
> 12 imprisonment provided by the guideline range
> 13 applicable to the defendant at the time of sentencing
> 14 pursuant to a government motion to reflect the
> 15 defendant's substantial assistance to authorities, a
> 16 reduction comparably less than the amended guideline
> 17 range determined under subdivision (1) of this
> 18 subsection may be appropriate.

19 *Id.* § 1B1.10(b)(2) (2011 ed.). The Amendment also added Application
20 Note 6, which stated that "the court shall use the version of this
21 policy statement that is in effect on the date on which the court
22 reduces the defendant's term of imprisonment as provided by 18
23 U.S.C. § 3582(c)(2)." *Id.* § 1B1.10 cmt. n.6 (2011 ed.).

1 In 2014, the Sentencing Commission issued Amendment 782
2 to the Guidelines, which reduced offense levels for certain controlled
3 substance offenses by two levels. In addition, the Sentencing
4 Commission adopted Amendment 788, which stated that
5 Amendment 782 should be applied retroactively.

6 C. Sentence-Reduction Proceedings

7 On April 30, 2015, pursuant to 18 U.S.C. § 3582(c)(2), Ramirez
8 made a *pro se* motion to the district court for a reduction of his
9 sentence under Amendment 782. In response, the Government
10 pointed out that Amendment 782 only lowered Ramirez's applicable
11 Guidelines range to 324 to 405 months' imprisonment, and that
12 Amendment 759 therefore rendered him ineligible for a sentence
13 reduction because his original sentence of 210 months was below the
14 minimum of the amended Guidelines range. Ramirez argued,
15 however, that the district court "should utilize the language

1 provided by the Sentencing Commission at the time of his original
2 sentencing in 2006." Joint App'x at 102.
3 On July 23, 2015, the district court denied Ramirez's
4 § 3582(c)(2) motion. The district court stated that Ramirez's
5 amended Guidelines range after application of Amendment 782 was
6 324 to 405 months' imprisonment. The court then followed U.S.S.G.
7 § 1B1.10(b)(2)(A)'s prohibition, ruling that "[b]ecause the Court
8 imposed a sentence that is below the minimum Guideline of the
9 amended Guidelines Range, and because the Court's initial variance
10 was not based on the defendant's substantial assistance to the
11 Government, the defendant is not eligible for a reduction in
12 sentence." *Id.* at 111–12.

13 **DISCUSSION**

14 On appeal, Ramirez argues that application of Amendment
15 759 to prohibit his sentence-reduction request violated the *Ex Post*
16 *Facto* Clause of the United States Constitution. We review *de novo*

1 questions of law regarding a district court's decision to grant or
2 deny an 18 U.S.C. § 3582(c)(2) motion. *United States v. Johnson*, 732
3 F.3d 109, 113 (2d Cir. 2013).[4]

4 Article I of the United States Constitution provides that
5 neither Congress nor any state shall pass an "ex post facto Law."
6 U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1. The *Ex Post Facto*
7 Clause applies, *inter alia*, to government actions that "make[] more
8 burdensome the punishment for a crime, after its commission."
9 *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001) (internal quotation
10 marks omitted); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)
11 (stating that the *Ex Post Facto* Clause applies to laws that "inflict[] a
12 greater punishment[] than the law annexed to the crime, when
13 committed"). A criminal or penal law is *ex post facto* when it is: (1)

[4] In his *pro se* § 3582(c)(2) motion, Ramirez did not expressly invoke the *Ex Post Facto* Clause. However, he did ask the district court to "utilize the language provided by the Sentencing Commission at the time of his original sentencing in 2006." Joint App'x at 102. As a result, the Government does not oppose application of *de novo* review, rather than plain error review. We need not determine whether plain error review applies, because we affirm the district court's ruling even under the less deferential *de novo* standard.

1 retrospective, and (2) more onerous than the law in effect on the date
2 of the offense. *Weaver v. Graham*, 450 U.S. 24, 30–31 (1981).

3 A. Retrospectivity

4 In *Weaver*, the Supreme Court explained that the "critical
5 question" in determining whether a law is retrospective is "whether
6 the law changes the legal consequences of acts completed before its
7 effective date." *Id.* at 31. Thus, the *Ex Post Facto* Clause attaches
8 when a law "applies to prisoners convicted for acts committed
9 before the provision's effective date." *Id.*

10 Here, the Government does not contest that Amendment 759
11 applies retrospectively to Ramirez. Indeed, Amendment 759's
12 change to § 1B1.10 potentially affects the sentence ultimately served
13 for an offense committed prior to the adoption of the Amendment
14 and is therefore retrospective. *See United States v. Kruger*, 838 F.3d
15 786, 790 (6th Cir. 2016) ("There is no question that Amendment 759
16 applies to prisoners convicted for acts committed before the

1 provision's effective date" (internal quotation marks omitted)). Even
2 construing this guideline change as retrospective, however,
3 Ramirez's challenge fails under *Weaver*'s second prong.

4 B. "More Onerous Than the Law in Effect on the Date of the
5 Offense"
6
7 Ramirez argues that the 2014 version of § 1B1.10(b) was more
8 onerous than the law in effect on the date of his offense because it
9 made him ineligible for a sentence reduction pursuant to
10 Amendment 782.

11 Analysis of this element focuses on whether the change in law
12 "presents a 'sufficient risk of increasing the measure of punishment
13 attached to the covered crimes.'" *Peugh v. United States*, 133 S. Ct.
14 2072, 2082 (2013) (quoting *Garner v. Jones*, 529 U.S. 244, 250 (2000));
15 *see also Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 508–09 (1995)
16 (stating that a law creating a mere "speculative, attenuated risk of
17 affecting a prisoner's actual term of confinement" does not violate
18 the *Ex Post Facto* Clause).

1 a. Applicability of the *Ex Post Facto* Clause to
2 § 3582(c)(2) Proceedings
3
4 The Government asserts that, by their nature, § 3582(c)(2)
5 sentence-reduction proceedings cannot increase punishment and,
6 therefore, the reduction limit imposed by amended § 1B1.10(b) on
7 such proceedings cannot be deemed more onerous than the law on
8 the date of the offense. Indeed, several of our sister circuits have
9 adopted this position. *See infra* at Part B.b. Ramirez contends that
10 this conclusion is contrary to the Supreme Court's decisions in
11 *Weaver* and *Lynce v. Mathis*, 519 U.S. 433 (1997).
12 In *Weaver*, the petitioner had pleaded guilty to the state crime
13 of second-degree murder. 450 U.S. at 25. On both the date of the
14 offense and the date of sentencing, there was a state statute in place
15 that provided a formula for deducting "gain-time credits" from the
16 incarceratory terms of prisoners who committed no infractions while
17 serving their sentences and faithfully performed tasks assigned to
18 them by prison authorities. *Id.* at 26. After the petitioner's

1 sentencing, the state legislature enacted a new formula reducing the
2 gain-time credits that prisoners could receive. *Id.* When the state
3 applied that formula to the petitioner, he challenged the new law as
4 *ex post facto*. *Id.* at 27.

5 The Supreme Court concluded that the new gain-time formula
6 was more onerous than the law in effect on the date of the
7 petitioner's offense and therefore violated the *Ex Post Facto* Clause.
8 *Id.* at 35–36. It reasoned that "reduction in gain-time accumulation
9 lengthen[ed] the period that someone in petitioner's position must
10 spend in prison." *Id.* at 33. Because "the new provision constrict[ed]
11 the inmate's opportunity to earn early release," it made more
12 onerous the punishment of crimes committed before its enactment.
13 *Id.* at 35–36.

14 Similarly, in *Lynce*, the Supreme Court held that retroactive
15 cancellation of certain state gain-time credits violated the *Ex Post*
16 *Facto* Clause. In 1986, the petitioner pleaded guilty to a state charge

1 of attempted murder. 519 U.S. at 435. While imprisoned, he
2 accumulated a number of gain-time credits under Florida state law,
3 including 1,860 days in "provisional credits." *Id.* at 435–36. As a
4 result, the petitioner was released from prison in 1992. *Id.* at 435.
5 Shortly after his release, however, the Florida legislature enacted a
6 law that retroactively canceled provisional credits for certain
7 inmates, including the petitioner. *Id.* at 436. As a result, the
8 petitioner was rearrested and returned to custody to complete his
9 sentence. *Id.*

10 In analyzing whether this retroactive cancellation of
11 provisional credits violated the *Ex Post Facto* Clause, the Supreme
12 Court stated that the "essential inquiry" was whether that
13 cancellation "had the effect of lengthening [the] petitioner's period
14 of incarceration." *Id.* at 442–43. The Court cited *Weaver*, and
15 explained that the removal of early-release provisions "can
16 constitute an increase in punishment." *Id.* at 445. Thus, even though

1 the cancellation of the provisional credits merely made the petitioner
2 ineligible for early release, the Court held that the statute violated
3 the *Ex Post Facto* Clause. *Id.* at 447; *see also Sash v. Zenk*, 439 F.3d 61,
4 65 (2d Cir. 2006) ("The *ex post facto* doctrine applies to any penal
5 enactment that retrospectively disadvantages a criminal offender,
6 whether or not it increases a criminal sentence.").

7 In sum, *Weaver* and *Lynce* hold that the *Ex Post Facto* Clause
8 prohibits certain post-sentencing limitations on reductions of
9 sentences. As we discuss in the next section, however, application of
10 the 2014 Guidelines to Ramirez on his § 3582(c)(2) motion does not
11 fall into the same category as the laws at issue in *Weaver* and *Lynce*
12 because it did not lengthen his prison sentence. Accordingly,
13 Ramirez's *ex post facto* challenge fails.

14 b. The "One-Book" Rule

15 Ramirez's argument on appeal necessarily requires the
16 application of provisions from different Guidelines manuals from

1 different years. He claims that the law was made more onerous
2 because the version of § 1B1.10(b) contained in the 2005 Guidelines
3 Manual—which permitted district courts to reduce sentences in
4 § 3582(c)(2) proceedings below the minimum of the amended
5 range—should have been applied to a sentencing reduction
6 authorized by Amendment 782, which took effect in 2014.
7 Controlling precedent, however, precludes such reasoning. It
8 requires us to compare the entire Guidelines Manual in effect at the
9 time of the initial sentencing—which did not include Amendment
10 782—to the entire Guidelines Manual in effect at the time of
11 Ramirez's § 3582(c)(2) proceeding—in which Amendment 782
12 authorized a guideline reduction but Amendment 759 limited the
13 extent of such a reduction.

14 Specifically, in *United States v. Keller*, 58 F.3d 884 (2d Cir. 1995),
15 *abrogated on other grounds by United States v. Mapp*, 170 F.3d 328, 338
16 n.15 (2d Cir. 1999), this court considered Guidelines that at the time

1 of the defendant's sentencing (the 1993 Guidelines) prescribed a
2 higher offense level for the defendant than the Guidelines at the
3 time of his offense (the 1989 Guidelines). *Id.* at 893. However, the
4 1993 Guidelines also allowed the defendant's term to be adjusted
5 downward for time already served on the instant offense—which
6 more than made up for the defendant's increased offense level. *Id.*
7 Such downward adjustments were not permitted under the earlier
8 version of the Guidelines. *Id.*

9 The district court applied the 1989 Guidelines at sentencing
10 and did not adjust for time served. *Id.* at 888. On appeal, the
11 defendant argued that the district court should have applied the
12 1993 Guidelines, to the extent they authorized downward
13 adjustment for time served, but not applied those Guidelines'
14 increase in the defendant's offense level.

15 We vacated and remanded for resentencing under the 1993
16 Guidelines, but rejected the defendant's selective application

1 argument. We explained that this court "adhere[s] to the so-called
2 'one-book' rule that most other circuits use to avoid twisting the
3 guidelines." *Id.* at 890. Under that rule, "[a] sentencing court has no
4 authority to pick and choose, taking one provision from an earlier
5 version of the guidelines and another from a later version." *Id.*
6 Instead, "[a] version of the sentencing guidelines is to be applied in
7 its entirety." *Id.* *Keller* applied the "one-book" rule to *ex post facto*
8 analysis, holding that "the one-book rule must . . . be employed to
9 determine in the first instance whether an *ex post facto* problem
10 exists." *Id.* Thus, "[w]hat is significant is a comparison of the version
11 of the guidelines in effect at sentencing against the version in effect
12 at the time the offense was committed."[5] *Id.* at 891. We concluded

[5] *Keller*'s holding is consistent with the language of the Sentencing Guidelines, which emphasizes that Guidelines Manuals should be applied in their entirety in *ex post facto* analyses. Specifically, U.S.S.G. § 1B1.11(b)(1) states that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." The Guidelines further clarify that "[t]he Guidelines Manual in effect on a particular date shall be applied in its

1 that, because the 1993 Guidelines, as a whole, produced a shorter
2 sentence for the defendant than the 1989 Guidelines, there would
3 have been no *ex post facto* violation in applying the 1993 Guidelines
4 in their entirety. *Id.* at 893.

5 In *Berrios v. United States*, 126 F.3d 430 (2d Cir. 1997), we
6 applied *Keller* to the sentence-reduction context. There, the
7 defendant pleaded guilty to conspiracy to possess cocaine with
8 intent to distribute, in violation of 21 U.S.C. § 846. *Id.* at 431. After
9 the defendant was sentenced, several intervening amendments were
10 made to the Sentencing Guidelines, including an amendment that

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entirety." U.S.S.G. § 1B1.11(b)(2). "The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual." *Id.* Section 1B1.11(b)(2) does add that "the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes." However, Ramirez does not contend that Amendment 782—which substantively changed the Guidelines calculation for certain offenses—was merely a clarifying change. *See United States v. Brooks*, 732 F.3d 148, 150 (2d Cir. 2013) (per curiam) ("By reducing the base offense levels for certain crack cocaine offenses, Amendments 748 and 750 [earlier versions of Amendments 782 and 788 with similar effect] plainly effected a substantive change in the law rather than merely clarified the Commission's prior intent.").

1 lowered the base offense level for violations of 21 U.S.C. § 846. *Id.* at
2 432. Section 1B1.10(b) was also amended to provide that, when
3 determining whether and to what extent a sentence reduction is
4 warranted, a court should only consider those amendments
5 specifically deemed retroactive in § 1B1.10, rather than all
6 subsequent amendments. *Id.* While the amendment reducing base
7 offense levels for violations of 21 U.S.C. § 846 had been deemed
8 retroactive, the change to § 1B1.10(b) prevented the defendant from
9 taking advantage of several other intervening amendments to the
10 Sentencing Guidelines. *Id.* at 432–33. The district court ultimately
11 granted the defendant's § 3582(c)(2) motion based on the base
12 offense level amendment regarding 21 U.S.C. § 846 crimes, and
13 reduced his sentence from 210 months' to 168 months'
14 imprisonment. *Id.* at 433. On appeal, the defendant asserted that the
15 § 1B1.10(b) amendment rendering him ineligible for other reductions
16 violated the *Ex Post Facto* Clause. *Id.* at 432–33.

1 We rejected the defendant's challenge. Citing *Keller*, we stated
2 that "[t]he relevant inquiry for *ex post facto* analysis is not whether a
3 particular amendment to the Sentencing Guidelines is detrimental to
4 a defendant, but whether application of the later version of the
5 Sentencing Guidelines, considered as a whole, results in a more
6 onerous penalty." *Id.* at 433. We ruled that "[a]nalogous principles
7 apply to a situation where, as here, an already-sentenced defendant
8 seeks to take advantage of later amendments to the Sentencing
9 Guidelines." *Id.* We then held that there was no *ex post facto* violation
10 because, even if the amendment to § 1B1.10(b) disadvantaged the
11 defendant by limiting the district court's consideration to only one
12 of the intervening amendments, the net effect of the amendments
13 favored him.[6] *Id.*

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[6] Both parties note that *Berrios* was decided under the "substantial disadvantage" test that the Supreme Court has since rejected. *See Peugh*, 133 S. Ct. at 2083 n.4 (acknowledging that the "substantial disadvantage" test has been abandoned and stating that the "relevant question is whether the change in law creates a sufficient or significant risk of increasing the punishment for a given crime" (internal quotation marks omitted)). However, *Berrios*'s use of the "substantial

1 Applying the "one-book" rule here, we conclude that there
2 was no *ex post facto* violation. At both the date Ramirez's crime was
3 committed and the date of his initial sentencing, § 1B1.10(b) did not
4 restrict district courts from imposing a sentence below the amended
5 Guidelines range at a sentence-reduction hearing. However, neither
6 of these Guidelines Manuals included Amendment 782, which is the
7 basis for Ramirez's eligibility for a sentence reduction. At the time of
8 the sentence-reduction hearing, the Guidelines Manual included
9 Amendment 782, but also the version of § 1B1.10(b)—based on
10 Amendment 759—that prohibited district courts from reducing a
11 sentence below a defendant's amended guidelines range. Thus,
12 under none of the relevant Guidelines Manuals did Amendment 782
13 and the prior version of § 1B1.10(b) *both* exist. Indeed, the two
14 provisions *never* coexisted in *any* Guidelines Manual.

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disadvantage" test does not call into question its application of *Keller* and the "one-book" rule to the sentence-reduction context.

1 Because Amendment 782 was not a part of the Guidelines at
2 the time of Ramirez's offense or sentencing and, without
3 Amendment 782, Ramirez would not be entitled to a sentencing
4 reduction even under the 2002 and 2005 versions of § 1B1.10, it
5 cannot be said that application of the 2014 Guidelines, including the
6 constraint on § 1B1.10 provided for by Amendment 759, "result[ed]
7 in a more onerous penalty." *Id.*[7]

8 Therefore, we reject Ramirez's argument that the district
9 court's failure to apply the prior version of § 1B1.10(b) in
10 conjunction with Amendment 782 constituted an *ex post facto*
11 violation. To hold otherwise would allow Ramirez to "pick and

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[7] Our conclusion accords with the principle of fair notice that undergirds *ex post facto* jurisprudence. *See Weaver*, 450 U.S. at 30 ("Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated."); *see also Peugh*, 133 S. Ct. at 2094. Where a Guidelines amendment affording a sentencing reduction did not exist at the time a defendant committed or was sentenced for the crime of conviction, a defendant could have no expectation of such a benefit, so as to require notice at that time of any eligibility limitations.

1 choose" provisions from different Guidelines Manuals, in violation
2 of the "one-book" rule. *Keller*, 58 F.3d at 890.

3 Ramirez maintains that he is not "pick[ing] and choos[ing] the
4 best pieces from different versions of the guidelines" because
5 Amendment 782 was made retroactively applicable. Appellant's
6 Reply Br. at 13. The implication is that Amendment 782 should be
7 considered part of the earlier Guidelines Manuals for the purposes
8 of the "one-book" rule. It is true that, under § 1B1.10(b)(1), a court
9 determines the defendant's amended Guidelines range by applying
10 Amendments listed in § 1B1.10(d) to the Guidelines in effect at the
11 time of initial sentencing. However, Ramirez cites no authority
12 indicating that this determination renders Amendment 782 part of
13 prior Guidelines Manuals, particularly *for the purpose of* ex post facto
14 *analysis*, and we decline to so rule here. Notably, in *Berrios*, we
15 confronted a situation in which the defendant sought application at
16 sentence-modification proceedings of an earlier version of §

1 1B1.10(b) as well as a retroactive Amendment reducing his offense
2 level. *See* 126 F.3d at 432–33. We applied *Keller* and ruled that there
3 was no *ex post facto* violation, without finding it significant that one
4 of the provisions the defendant sought to apply was retroactive. *Id.*
5 at 433.

6 *Keller*'s application of the "one-book" rule to an *ex post facto*
7 challenge still dictates that we compare the version of the Guidelines
8 in effect at a sentencing reduction proceeding against the version in
9 effect at the time of the defendant's original offense and sentence.[8]
10 *See id.* (citing *Keller*'s articulation and stating that "[a]nalogous
11 principles apply to a situation where . . . an already-sentenced
12 defendant seeks to take advantage of later amendments to the
13 Sentencing Guidelines"). Here, then, we must compare the 2014
14 Guidelines Manual as a whole to the 2002 and 2005 Guidelines

[8] In light of the fact that § 1B1.10 did not change between the time of Ramirez's commission of the offense and sentencing, we need not decide which moment serves as the relevant point of comparison.

1 Manuals each as a whole. Under the 2014 Guidelines Manual,
2 Ramirez is entitled to have Amendment 782 applied to his prior
3 Guidelines determination, but subject to the limitation in §
4 1B1.10(b)(2)(A) which ultimately made him ineligible for a
5 reduction. Under the Guidelines Manuals in effect at the time of the
6 offense and initial sentence, Ramirez was not entitled to application
7 of Amendment 782. Thus, Ramirez is not eligible for a sentence
8 reduction under *any* Guidelines Manual considered as a whole. In
9 these circumstances, we conclude that the 2014 Guidelines are not
10 more onerous on Ramirez than the 2002 or 2005 Guidelines and,
11 thus, there is no *ex post facto* violation.

12 Our holding that there is no *ex post facto* violation in applying
13 Amendment 759 to limit sentence reductions authorized by a later
14 Amendment—such as Amendment 782—is consistent with the

1 rulings of every other circuit to have addressed this question.[9] *See*
2 *Kruger*, 838 F.3d at 790–92 [6th Cir.]; *United States v. Thompson*, 825
3 F.3d 198, 204–06 (3d Cir. 2016); *United States v. Kurtz*, 819 F.3d 1230,
4 1236–37 (10th Cir. 2016); *United States v. Bayatyan*, 633 F. App'x 912,
5 915–16 (10th Cir. 2015) (unpublished opinion); *United States v.*
6 *Waters*, 771 F.3d 679, 680–81 (9th Cir. 2014) (per curiam); *United*
7 *States v. Diggs*, 768 F.3d 643, 645–46 (7th Cir. 2014); *United States v.*
8 *Colon*, 707 F.3d 1255, 1258–59 (11th Cir. 2013); *see also United States v.*
9 *Kay*, 655 F. App'x 165 (4th Cir. July 22, 2016) (mem.), *aff'g* No. 09-cr-
10 252 (TEJ), 2016 WL 661591, at *2–3 (S.D.W. Va. Feb. 18, 2016). While
11 these other circuits have not explicitly invoked the "one-book" rule
12 in this context, *Kruger*, *Bayatyan*, and *Colon* employed reasoning that

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[9] Ramirez relies on two district court cases, which come to a contrary conclusion. *See Alli-Balogun v. United States*, 114 F. Supp. 3d 4, 49–50 (E.D.N.Y. 2015); *United States v. King*, No. 99-cr-952-1, 2013 WL 4008629, at *21 (N.D. Ill. Aug. 5, 2013). However, *Alli-Balogun* addressed a different provision—U.S.S.G. § 1B1.10(e)—and involved a defendant who had served more than the maximum sentence of the amended Guidelines range, such that § 1B1.10(e) operated to increase his punishment. Meanwhile, *King* has been abrogated by *United States v. Diggs*, 768 F.3d 643 (7th Cir. 2014).

1 implicitly applied it. In both *Kruger* and *Bayatyan*, the courts
2 partially based their conclusions on the fact that Amendment 782
3 did not exist in the Guidelines at the time of initial sentencing. *See*
4 *Kruger*, 838 F.3d at 791 ("[T]he . . . version of § 1B1.10 [at the time of
5 initial sentencing] didn't list Amendment 782 (which wouldn't come
6 into existence for several more years) as a covered amendment, and
7 so it could not have afforded [the defendant] any relief on the basis
8 of it."); *Bayatyan*, 633 F. App'x at 915 (finding no *ex post facto*
9 violation because "at no point was Amendment 782 covered under
10 the 2010 version of § 1B1.10," which defendant claimed applied at
11 his initial sentencing). In making this point, *Kruger* and *Bayatyan*
12 both looked to Guidelines Manuals *as a whole*—as prescribed by the
13 "one-book" rule—rather than permitting the application of
14 provisions across different Guidelines Manuals. Similarly, in *Colon*—
15 which concerned application of Amendment 759 to limit sentencing
16 reduction pursuant to Amendment 750—the court concluded that

1 there was no *ex post facto* violation because "[t]he net effect of
2 Amendments 750 and 759 was not to increase [defendant's] range of
3 punishment above what it was at the time she committed her
4 crimes." 707 F.3d at 1258–59. By comparing the Guidelines range at
5 the time defendant committed her crimes to the Guidelines range at
6 the time of the § 3582(c)(2) proceeding, the court implicitly engaged
7 in the same analysis called for by the "one-book" rule.

8 **CONCLUSION**

9 We hold that Amendment 759's application prohibiting
10 Ramirez from taking advantage of Amendment 782 does not violate
11 the *Ex Post Facto* Clause. We therefore **AFFIRM** the district court's
12 order denying Ramirez's motion for sentence reduction under 18
13 U.S.C. § 3582(c)(2).