FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. VINCE EDWARD WILSON, *Defendant-Appellant.*	No. 20-50015 D.C. No. 2:04-cr-01453-ABC-1 OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted April 13, 2021
Pasadena, California

Filed August 11, 2021

Before: Milan D. Smith, Jr. and Sandra S. Ikuta, Circuit Judges, and Kathryn H. Vratil,[*] District Judge.

Per Curiam Opinion;
Concurrence by Judge Ikuta;
Dissent by Judge Vratil

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[*] The Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed the district court's denial of Vince Wilson's second motion for a sentence modification under 18 U.S.C. § 3582(c)(2).

The district court (then Judge Takasugi) sentenced Wilson in 2006 to a total of 352 months for eleven counts of importation and sale of a controlled substance (Counts 1–11), one count of possession of a firearm in furtherance of a drug trafficking crime (Count 12), and one count of being a felon in possession of a firearm (Count 13) (grouped with Counts 1–11). In accordance with the parties' joint stipulation under § 3582(c)(2), the district court (Judge Hatter) reduced Wilson's sentence in 2015 to 347 months as a result of Sentencing Guidelines Amendment 782 (2014), which retroactively reduced by two levels the offense levels assigned to specified quantities of drugs. In 2018, Wilson moved for reconsideration of the 2015 modification order, arguing that to accomplish Amendment 782's "full 2-point deduction," Judge Hatter should have given him the low end of the new Guidelines range for Counts 1–11 and 13, plus 60 months mandated for Count 12, for a total of 295 months. Judge Hatter denied that motion.

In 2019, Wilson filed his second motion for sentence modification under § 3582(c)(2), arguing that in order to effectuate Judge Takasugi's intent to sentence Wilson to a

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

low-end guideline sentence, Judge Hatter should modify his current term of imprisonment so that the 52-month sentence for Count 13 ran concurrently with his sentence on Counts 1–11. Judge Hatter denied that motion.

Although it is an open question whether Wilson is currently serving a term of imprisonment that is based, even in part, on a sentencing range that has subsequently been lowered by Amendment 782, the panel assumed without deciding that Wilson is eligible to seek relief under § 3582(c)(2).

Wilson argued that Judge Hatter erred in stating that there is no authority "that supports the proposition that Amendment 782's changes to the drug quantity thresholds had any effect on his firearm conviction," and that this error tainted his exercise of discretion in denying the motion for a sentence modification. In exercising his discretion to deny Wilson's second § 3582(c)(2) motion, Judge Hatter assumed for the sake of argument that Wilson was eligible for a sentence reduction on Count 13 under Amendment 782. The panel wrote that given Judge Hatter's consideration of the applicable factors under 18 U.S.C. § 3553(a), any error in Judge Hatter's view regarding the effect of Amendment 782 on the firearm offense was harmless.

Wilson next argued that Judge Hatter failed to provide a sufficient explanation of his reasons for denying Wilson's motion to modify his sentence. Assuming arguendo that Wilson was eligible for a further sentence modification in 2019, Judge Hatter stated that he would decline to exercise his discretion to modify the sentence in light of "the factors set forth in 18 U.S.C. § 3553 and, *inter alia*, the nature of Wilson's crimes." Considering this explanation in light of

the initial sentencing and the intuitive reasons why the district court may have made its sentencing determination, the panel concluded that Judge Hatter provided an adequate explanation for denying Wilson's motion to modify his sentence so that the 52-month sentence for Count 13 ran concurrently with his sentence for Counts 1–11.

Wilson argued that the denial of the motion was substantively unreasonable because, unlike the term originally imposed by Judge Takasugi, his current term of imprisonment is not at the low end of the applicable range for the grouped counts. The panel concluded that the denial of Wilson's motion was not substantively unreasonable. The panel noted that there is no presumption that Judge Hatter would take the same approach in the § 3582(c) proceeding as that taken by Judge Takasugi in the original sentencing. The panel also wrote that Judge Hatter was not required to give more weight to Wilson's rehabilitative efforts in prison than to the nature of Wilson's conduct.

Concurring, Judge Ikuta agreed with the majority that if Wilson were entitled to seek a sentence modification when he filed his second § 3582(c) motion in 2019, the district court did not err in denying his motion. But in her view, there is a simpler way to decide this appeal. Under the plain text of § 3582(c)(2), Wilson was not eligible to seek a further sentence modification in 2019 because Wilson was not serving "a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Rather, his term of imprisonment had been reduced in 2015 based on a sentencing range lowered by Amendment 782, and there has been no subsequent amendment lowering the applicable sentencing range.

District Judge Vratil dissented because she would find that when the Federal Public Defender filed the 2019 motion which is the subject of this appeal, Wilson was still serving his 2006 sentence on Count 13 and—because Amendment 782 subsequently lowered the sentencing range for that count—he was eligible for a reduced sentence under § 3582(c)(2). She wrote that the district court misapprehended the law when it held that Wilson was ineligible for relief under§ 3582(c)(2) because the original sentence on Count 13 was not "based on" Section 2D1.1 of the guidelines, which Amendment 782 subsequently lowered. She would also hold that the district court did not adequately explain its conclusion that even if Wilson were eligible for relief on Count 13, it would nevertheless deny such relief.

COUNSEL

Brianna Fuller Mircheff (argued), Deputy Federal Public Defender; Cuauhtemoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellant.

Meryl Holt (argued), Assistant United States Attorney; L. Ashley Aull, Chief, Criminal Appeals Section; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

PER CURIAM:

Appellant Vince Wilson appeals the district court's denial of his second motion for a sentence modification under 18 U.S.C. § 3582(c)(2). Assuming that Wilson was entitled to relief under § 3582(c)(2), the district court did not procedurally or substantively err in exercising its discretion to deny the motion.

I

In December 2005, Wilson was convicted of eleven counts related to the importation and sale of a controlled substance (Counts 1–11); one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count 12), and one count of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1) (Count 13).

The Presentence Report (PSR) prepared for the district court grouped Counts 1–11 with Count 13.[1] Under the Sentencing Guidelines, when counts are grouped together, the offense level applicable to the group is "the highest offense level of the counts in the Group." U.S.S.G. § 3D1.3(a). Following this rule, the PSR used the applicable offense level

[1] Counts are grouped "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in . . . the guideline applicable to another of the counts." U.S. Sent'g Guidelines Manual § 3D1.2(c) (Nov. 2005). Possessing "a dangerous weapon (including a firearm)" is one such "specific offense characteristic[]" for a drug importation offense. U.S.S.G. § 2D1.1(b)(1).

for Counts 1–11, *see id.* § 2D1.1, because it is higher than that for Count 13, *see id.* § 2K.2.1. Applying the Drug Quantity Table in § 2D1.1(c)(2), the PSR calculated an offense level of 36 for the quantity of drugs involved in Counts 1–11. § 2D1.1(c)(2). The PSR also applied a 2-level increase to the offense level because Wilson "was an organizer, leader, manager, or supervisor in [the] criminal activity." § 3B1.1(c). The total offense level was thus 38. The PSR determined that Wilson was in Criminal History Category III. Therefore, the Guidelines sentencing range for Counts 1–11 and 13 was 292–365 months imprisonment. For Count 12, the statutory mandatory minimum sentence was 60 months, applied consecutively. 18 U.S.C. § 924(c)(1)(A)(i); U.S.S.G. § 5G1.2(e). Therefore, the PSR calculated the Guidelines sentencing range for all counts as 352–425 months.

At Wilson's sentencing in 2006, the district court (then Judge Takasugi) relied on the calculations set out in the PSR. For the grouped Counts 1–11 and 13, Judge Takasugi chose to sentence Wilson to 292 months, the low end of the range. But this low-end number exceeded the statutory maximum sentence of 240 months for each of Counts 1–11. Under the Guidelines, "[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment." U.S.S.G. § 5G1.2(d). Following this direction, the court sentenced Wilson to 240 months on each of Counts 1–11, to be served concurrently, and 52 months on Count 13, to be served consecutively, for a total of 292 months (the low-end of the Guidelines range). Finally, for Count 12, the court sentenced Wilson to the statutory minimum of 60 months, to

be served consecutively. 18 U.S.C. §924(c)(1)(A)(i); U.S.S.G. § 5G1.2(e) ("[T]he sentence to be imposed on the 18 U.S.C. § 924(c) . . . count shall be imposed to run consecutively to any other count."). Wilson's total sentence was therefore 352 months.

In 2014, Congress approved Amendment 782 to the Sentencing Guidelines, which retroactively amended the Drug Quantity Table, U.S.S.G. § 2D1.1(c), thereby reducing by two levels the offense levels assigned to specified quantities of drugs. In Wilson's case, this meant that the Drug Quantity Table now showed an offense level of 34, instead of 36, for the quantity of drugs involved in Counts 1–11, making him eligible for a sentence modification under 18 U.S.C. § 3582(c)(2).[2]

The following year, the government and the Office of the Federal Public Defenders (FPD) entered into a joint stipulation asking the district court (now Judge Hatter) to appoint the FPD to represent a specified list of defendants, including Wilson, and to reduce their sentences under

[2] 18 U.S.C. § 3582(c)(2) provides:

> The court may not modify a term of imprisonment once it has been imposed except that— . . . (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . , 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.

§ 3582(c)(2) as a result of Amendment 782.[3] As for Wilson's sentence, the parties stipulated that the base offense level should be reduced from 36 to 34. Adding the two-level increase under § 3B1.1(c) (for being an organizer, leader, manager or supervisor), the reduced total offense level was 36 (rather than 38) and the reduced Guidelines range was 235–293 months. Based on this reduction, the parties asked for Wilson's sentence to be modified to 235 months on each of Counts 1–11, to be served concurrently, 52 months on Count 13, to be served consecutively (adding up to 287 months on the grouped Counts 1–11 and 13), and 60 months on Count 12 to be served consecutively, for a total of 347 months. Judge Hatter reduced Wilson's sentence exactly as requested in the stipulation.

[3] Wilson does not claim that the FPD failed to discharge its ethical obligation to consult with him regarding his first § 3582(c)(2) motion, and there is no evidence in the record that the FPD violated this duty. In the absence of evidence in the record, we assume that the FPD conducted itself ethically. *See* Cal. Rules of Professional Conduct, rule 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall reasonably consult with the client as to the means by which they are to be pursued."). In arguing that the FPD did not communicate with Wilson about the stipulation, and that Wilson did not learn of the stipulation until after the district court entered its order, the dissent relies on a factual allegation made by Wilson's attorney in oral argument, unsupported by evidence in the record. Dissent at 29 & n.4. Such attorney argument does not constitute evidence. *See Carrillo-Gonzalez v. I.N.S.*, 353 F.3d 1077, 1079 (9th Cir. 2003). Finally, the dissent's argument that the district court did not appoint the FPD to seek a plenary resentencing for Wilson, Dissent at 29 n.4, is irrelevant. The Supreme Court has made clear that Congress intended § 3582(c)(2) "to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon v. United States*, 560 U.S. 817, 826 (2010). What is significant, however, is that the "limited adjustment" in this case affected all of the grouped counts.

Three years later, in 2018, Wilson filed a motion for reconsideration of the court's sentence modification order. According to Wilson, to accomplish Amendment 782's "full 2-point deduction," Judge Hatter should have given him the low end of the new Guidelines range (235 months) for Counts 1–11 and 13, plus 60 months mandated for Count 12, for a total of 295 months instead of 347 months. Judge Hatter denied the motion. He reasoned that "[b]ecause Amendment 782 served only to reduce the total base offense level of the drug convictions, Amendment 782 had no effect on the sentence[] based on [Count 13]." Although Wilson appealed this denial of his motion for reconsideration, his appeal was subsequently dismissed for failure to prosecute.[4]

In October 2019, Wilson filed a second motion for sentence modification under § 3582(c). Wilson argued that Judge Hatter had erred in modifying his sentence in 2015 because Judge Hatter reduced his sentence only on Counts 1–11, and failed to reduce the sentence on Count 13, even though Wilson was eligible for a reduction on that count as well. According to Wilson, Judge Hatter failed to realize that Judge Takasugi had allocated 52 months to Count 13 only because the low end of the Guidelines range for the grouped Counts 1–11 and 13 exceeded the statutory maximum sentence of 240 months for Counts 1–11. After Amendment 782, the low end of the Guidelines range was less than the statutory maximum for Counts 1–11, and so there was no need to allocate 52 months to Count 13 to run consecutively.

[4] In 2018, Wilson also filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C § 2255, claiming, among other things, that the PSR miscalculated his recommended Guidelines range and that the consecutive sentences for Counts 12 and 13 violated double jeopardy. Judge Hatter denied the motion on timeliness grounds.

In order to effectuate Judge Takasugi's intent to sentence Wilson to a low-end guideline sentence, Wilson argued, Judge Hatter should modify his current term of imprisonment so that the 52-month sentence for Count 13 ran concurrently with his sentence on Counts 1–11. In effect, Wilson argued that Judge Hatter erred by failing to give him the low-end of the amended Guidelines range in 2015 as Judge Takasugi originally did in 2006, and should correct that error in a second sentence modification in 2019. The government opposed the motion.

Judge Hatter denied Wilson's motion for a sentence modification. The court reviewed Wilson's conviction, his original sentence imposed in 2006, his resentencing in 2015, and his 2018 motion for reconsideration. The court acknowledged that "Amendment 782 increased the drug quantity thresholds for most of the base offense levels of § 2D1.1's Drug Quantity Table, which, consequently, lowered the sentencing ranges for some individuals' drug convictions." However, the court held that "Wilson points to no authority . . . that supports the proposition that Amendment 782's changes to the drug quantity thresholds of § 2D1.1 had any effect on his firearm conviction," and therefore rejected Wilson's argument that he was entitled to a reduction of his firearm-related sentence (Count 13) because it was grouped with his drug convictions and therefore was based on the Drug Quantity Table. Further, citing *United States v. Dunn*, 728 F.3d 1151, 1158–1160 (9th Cir. 2013), Judge Hatter stated that "even assuming, *arguendo*, that Wilson is eligible for a sentence reduction on his [firearm] conviction under Amendment 782, the Court, having considered the factors set forth in 18 U.S.C. § 3553 and, *inter alia*, the nature of Wilson's crimes, declines to exercise its discretion to resentence him."

Wilson now appeals the district court's denial of his motion for a second sentence modification under § 3582(c). He argues that Judge Hatter erred in concluding he lacked authority to reduce the sentence for Count 13, and, according to Wilson, this error tainted his discretionary denial of Wilson's motion. Wilson also contends that Judge Hatter procedurally erred by failing to provide a sufficient explanation for denying Wilson's motion, *see* 18 U.S.C. § 3553(a). Finally, Wilson argues that the denial of his motion rendered his sentence substantively unreasonable.

II

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review a district court's discretionary denial of a motion for sentence modification under § 3582(c)(2) for abuse of discretion. *United States v. Colson*, 573 F.3d 915, 916 (9th Cir. 2009). "A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010) (citation omitted). Although it is an open question whether Wilson is currently serving a term of imprisonment that is based, even in part, on a sentencing range that has subsequently been lowered by Amendment 782, *cf.* Concurrence at 20–22; Dissent at 38–42, for purposes of this appeal we assume without deciding that Wilson is eligible to seek relief under § 3582(c)(2).

A

We begin with Wilson's argument that Judge Hatter erred in stating that there is no authority "that supports the proposition that Amendment 782's changes to the drug

quantity thresholds of § 2D1.1 had any effect on his firearm conviction," and that this error tainted his exercise of discretion in denying the motion for a sentence modification. To determine whether an amendment that affects the count with the highest offense level (Counts 1–11 here) is also deemed to affect other grouped counts (Count 13 here), such that the sentence for all the counts are deemed to be "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" for purposes of § 3582(c)(2), we look to whether "the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence." *See United States v. Aguilar-Canche*, 835 F.3d 1012, 1017 (9th Cir. 2016) (cleaned up) (holding that the Guidelines range for the combined offenses was not a relevant part of the analytic framework for the sentence because the district court applied the statutory minimum sentence to each charge). We have not previously addressed this precise issue. And we need not address it here, because in exercising his discretion to deny Wilson's second § 3582(c) motion, Judge Hatter assumed for the sake of argument that Wilson was eligible for a sentence reduction on Count 13 under Amendment 782. Given Judge Hatter's consideration of the applicable factors under § 3553(a), as explained below, even if Judge Hatter had erred in his view regarding the effect of Amendment 782 on the firearm offense, any such error was harmless. *See United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 & n.5 (9th Cir. 2011) (per curiam) (noting that a district court's sentencing error is harmless if it performs the sentencing analysis under the correct, as well as incorrect Guidelines range).

B

We therefore turn to Wilson's second argument that Judge Hatter failed to provide a sufficient explanation of his reasons for denying Wilson's motion to modify his sentence. The Supreme Court has recently provided some guidance on how we should evaluate the adequacy of a court's reasons for modifying a sentence. *See Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018).

In *Chavez-Meza*, the district court initially sentenced a defendant to a sentence at the bottom of the Guidelines range. *Id.* at 1966. After Amendment 782 to the Guidelines lowered the relevant range, the defendant "asked the judge to reduce his sentence to . . . the bottom of the new range," but the judge reduced the defendant's sentence to a midway point instead. *Id.* at 1967. The judge entered his order on a "barebones form" that certified that the judge had considered the defendant's motion and taken into account the § 3553(a) factors and relevant Guidelines policy statement, but otherwise provided no explanation. *Id.* at 1965, 1967.

Chavez-Meza first acknowledged the government's argument that while a court has a statutory requirement to "state in open court the reasons for its imposition of the particular sentence" at the initial sentencing, 18 U.S.C. § 3553(c), no similar requirement is imposed at a resentencing under § 3582(c)(2). *Chavez-Meza*, 138 S. Ct. at 1965, 1967. But instead of addressing this argument, *Chavez-Meza* "assum[ed] (purely for argument's sake) [that] district courts have equivalent duties when initially sentencing a defendant and when later modifying the sentence." *Id.*

Making this assumption arguendo, *Chavez-Meza* held that the court's brief explanation was adequate. In reaching this conclusion, the Court held there was no presumption that a judge who picked the low range of a Guidelines sentence at the initial sentencing would also pick the low range at the resentencing. *Id.* at 1966. The Court next held that the length or brevity of the explanation provided by a judge at resentencing is mostly left to "the judge's own professional judgment." *Id.* (cleaned up). Finally, the Court ruled that a judge's explanation provided at resentencing must be considered in light of the initial sentencing, including the court's awareness of the defendant's arguments, its consideration of the relevant sentencing factors, and the intuitive reason for picking a particular sentence. *Id.* at 1966–68. The Court concluded that the judge's explanation in that case, which consisted solely of conclusory statements on a pre-printed form, "fell within the scope of the lawful professional judgment that the law confers upon the sentencing judge." *Id.* at 1968.

In short, under *Chavez-Meza*, even assuming that a district court needs to provide an on-the-record explanation of its reasons for imposing a particular sentence in a resentencing proceeding under § 3582(c)(2), a minimal explanation is adequate in light of the deference due to the judge's professional judgment and the context of a particular case.

Applying this standard, we conclude that Judge Hatter provided an adequate explanation for denying Wilson's motion to modify his term of imprisonment so that the 52-month sentence for Count 13 ran concurrently with his sentence for Counts 1–11. *Chavez-Meza*, 138 S. Ct. at 1966. Assuming arguendo that Wilson was eligible for a further

sentence modification in 2019, Judge Hatter stated that he would decline to exercise his discretion to modify Wilson's sentence in light of "the factors set forth in 18 U.S.C. § 3553 and, *inter alia*, the nature of Wilson's crimes." We consider this explanation in light of the initial sentencing and "the intuitive reason[s]" why the district court may have made its sentencing determination. *Id.* at 1967. Because Judge Hatter had presided over Wilson's first motion for sentence modification, his motion for reconsideration, and his § 2255 motion challenging his sentence, Judge Hatter was well familiar with Wilson's crimes and arguments. Wilson's crimes were significant, and he had received a 2-level enhancement due to his involvement as "an organizer, leader, manager, or supervisor in [the] criminal activity." U.S.S.G. § 3B1.1(c). Such culpability provides an "intuitive reason" for the court's decision to deny the motion for a sentence reduction, *Chavez-Meza*, 138 S. Ct. at 1967. Moreover, Judge Hatter stated that he had considered the § 3553(a) factors. *See id.* at 1964–65 (approving a court's explanation as sufficient when it certified that it had "considered petitioner's motion and had taken into account the § 3553(a) factors" (cleaned up)). Giving due deference to Judge Hatter's professional judgment, we conclude that Judge Hatter's "statement of reasons was brief but legally sufficient," and fell easily within the scope of "the judge's own professional judgment." *Rita v. United States*, 551 U.S. 338, 339, 356, 358 (2007); *see also Chavez-Meza*, 138 S. Ct. at 1967–68. The dissent attempts to distinguish *Chavez-Meza* because Judge Hatter "denied all relief" when he denied Wilson's second § 3582(c)(2) motion, whereas the district court in *Chavez-Meza* "grant[ed] substantial but not all relief." Dissent at 45. But there is no basis for the dissent's suggestion that a district judge must provide a longer or shorter explanation depending on the amount of relief

granted. Dissent at 44–45. Rather, *Chavez-Meza* made clear that we defer to "the judge's own professional judgment," 138 S. Ct. at 1966 (quoting *Rita*, 551 U.S. at 356), in determining whether the judge's explanation was adequate.

C

Wilson also argues that the district court's denial of his motion is substantively unreasonable. We review the substantive reasonableness of a sentence imposed by the district court "under an abuse-of-discretion standard," *Gall v. United States*, 552 U.S. 38, 51 (2007), "and will provide relief only in rare cases," *United States v. Ressam*, 679 F.3d 1069, 1088 (9th Cir. 2012) (en banc). Reversal is "not justified simply because this court thinks a different sentence is appropriate. Rather, this court should only vacate a sentence if the district court's decision not to impose a lesser sentence was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Laurienti*, 731 F.3d 967, 976 (9th Cir. 2013) (cleaned up). "Although we do not automatically presume reasonableness for a within-Guidelines sentence, in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Id.* (cleaned up).

Wilson argues that his sentence is substantively unreasonable because his current term of imprisonment (52 months for Count 13 plus 235 months for Counts 1–11) is not at the low end of the applicable range for the grouped counts, unlike the term Judge Takasugi originally imposed in 2006. Because the nature of Wilson's offense had not changed since 2006, and there was evidence of his efforts to

rehabilitate himself since that time, Wilson claims there was no reason for Judge Hatter to impose anything other than a low-end sentence. According to Wilson, Judge Hatter was substantively unreasonable in declining to modify the sentence so the 52 month term for Count 13 would run concurrently with the sentence on Counts 1–11.

We disagree. Wilson fails to recognize that it was within Judge Hatter's discretion to conclude that a 287-month sentence for the grouped Counts 1–11 and 13 was appropriate. As the Supreme Court explained in *Chavez-Meza*, there is no presumption that Judge Hatter would take the same approach in the § 3582(c) proceeding as that taken by Judge Takasugi in the original sentencing and "choose a point within the new lower Guidelines range that is proportional to the point previously chosen in the older higher Guidelines range." 138 S. Ct. at 1966 (cleaned up). The 287-month term that Judge Hatter imposed for the grouped Counts 1–11 and 13 is within the applicable Guidelines range of 235–293 months.[5] Moreover, the parties had stipulated to the range Judge Hatter imposed, which further undercuts any

[5] After Amendment 782, the applicable Guidelines range for the grouped Counts 1–11 and 13 is 235–293 months. Under the Guidelines, the offense level applicable to the most serious of the counts comprising the group is the offense level applicable to the entire group. U.S.S.G. § 3D1.3(a). The parties do not argue that Judge Hatter applied an incorrect Guidelines range in 2015 for the entire group, and the new term of 287 months is within the range. Therefore, Wilson's reliance on *Munoz-Camarena*, 631 F.3d 1028, and *United States v. Trujillo*, 713 F.3d 1003 (9th Cir. 2013), is misplaced, because the district court in *Munoz-Camarena* applied the incorrect range, 631 F.3d at 1029–30, and the district court in *Trujillo* imposed a sentence outside of the Guidelines range, 713 F.3d at 1005.

argument that taking the agreed-upon approach was an abuse of discretion.

Nor was Judge Hatter required to give more weight to Wilson's rehabilitative efforts in prison than to the nature of Wilson's offense conduct. "The weight to be given the various factors in a particular case is for the discretion of the district court." *United States v. Gutierrez-Sanchez*, 587 F.3d 904, 908 (9th Cir. 2009). Wilson argues that the district court erred because the Guidelines already took into account the aggravating circumstances of Wilson's offense, but as we have pointed out, "there is nothing under § 3553(a), or any other provision, which barred the district court from considering" factors that were "fully accounted for" by the Guidelines calculations in deciding whether to grant or deny a reduced sentence. *Dunn*, 728 F.3d at 1158–59.

In short, this is one of "the overwhelming majority of cases," wherein a within-Guidelines sentence "fall[s] comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Laurienti*, 731 F.3d at 976 (cleaned up). Again, we have recognized that "a Guidelines sentence 'will usually be reasonable.'" *United States v. Carty*, 520 F.3d 984, 994 (9th Cir. 2008) (quoting *Rita*, 551 U.S. at 338). We therefore conclude that the district court's denial of Wilson's motion was not substantively unreasonable.

* * *

Under the deferential abuse-of-discretion standard of review, we cannot conclude that the district court procedurally or substantively erred in denying Wilson's second § 3582(c)(2) motion. Therefore, even assuming that

Wilson was serving "a term of imprisonment based on a sentencing range that has subsequently been lowered by" Amendment 782, § 3582(c)(2), and the district court erred in holding otherwise, reversal is not warranted in this case.

AFFIRMED.

IKUTA, Circuit Judge, concurring:

I agree with the majority that if Wilson were entitled to seek a sentence modification when he filed his second 18 U.S.C. § 3582(c) motion in 2019, the district court did not err in denying Wilson's motion.

But there is a simpler way to decide this appeal. Under the plain text of § 3582(c)(2), Wilson was not eligible to seek a further sentence modification in 2019 because Wilson was not serving "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). Rather, his term of imprisonment had been reduced in 2015 based on a sentencing range lowered by Amendment 782, and there has been no subsequent amendment lowering the applicable sentencing range.

A

Under § 3582(c), a court "may not modify a term of imprisonment once it has been imposed" unless the defendant is serving "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). This requirement

applies to the sentence the defendant is currently serving. If the defendant's sentence had previously been modified, then the sentence the defendant is serving is the modified sentence, not the defendant's initial sentence. *See United States v. Derry*, 824 F.3d 299, 301–02 (2d Cir. 2016). In other words, "when a defendant is serving a term of imprisonment that has been modified pursuant to § 3582(c)(2), his sentence is 'based on' the guideline range applied at his most recent sentence modification, rather than the range applied at his original sentencing." *Id.* at 301; *see also United States v. Banks*, 770 F.3d 346, 348 (5th Cir. 2014) ("We hold that under section 3582, a defendant's sentence is 'based on' the guidelines range for the sentence he is currently serving . . . ."); *United States v. Tellis*, 748 F.3d 1305, 1309 (11th Cir. 2014) (holding that a defendant's first sentence modification rendered him ineligible for a second sentence modification).[1]

Wilson is currently serving a 287-month term of imprisonment for the grouped Counts 1–11 and 13 (235 months for Counts 1–11 and 52 months for Count 13) that was modified by Judge Hatter in 2015 after the

[1] This principle does not prevent a defendant who was previously denied a sentence modification from bringing a successive motion under § 3582(c). *See United States v. Trujillo*, 713 F.3d 1003, 1006–07 (9th Cir. 2013). In a case such as *Trujillo*, where a prior motion for a modification was denied, the sentence the defendant is currently serving "is the one originally imposed upon him when he was convicted," *id.* at 1006, and the defendant remains subject "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). By contrast, where the sentence the defendant is serving was previously reduced, and there has been no subsequent amendment by the Sentencing Commission that further reduces the Guidelines range on which the modified sentence was based, a court has no authority to lower the defendant's sentence a second time. *See Derry*, 824 F.3d at 301–02; *Tellis*, 748 F.3d at 1309.

sentencing range for this grouping was lowered by Amendment 782. *See Derry*, 824 F.3d at 305. Because there has been no relevant amendment of the Guidelines since that time, Wilson is not serving a sentence "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" for purposes of 18 U.S.C. § 3582(c).[2] Therefore, the district court lacked authority to modify Wilson's sentence on the grouped Counts 1–11 and 13 under § 3582(c) in 2019. We should uphold Judge Hatter's denial of Wilson's motion on this ground alone.

B

In an effort to sidestep the text of § 3582(c)(2), Wilson argues that Amendment 782 lowered the sentencing range for both Counts 1–11 and Count 13, but Judge Hatter's 2015 order reduced the term of imprisonment only for Counts 1–11. Because his sentence for Count 13 was not lowered when Judge Hatter issued the 2015 order, Wilson argues, he is now eligible for a further sentence reduction on this count.

This argument fails because under the Guidelines, Judge Hatter in 2015 imposed a sentence for all of the grouped counts (Counts 1–11 and 13) based on a sentencing range that was subsequently lowered by Amendment 782. Because of the Guidelines rules, Count 13 cannot be disaggregated from Counts 1–11 when we consider the effect of Amendment 782

[2] Wilson argues that the government forfeited the argument that he was not entitled to a second sentence modification under § 3582(c)(2). This is incorrect. The government vigorously argued that Wilson was not entitled to a modification of his modified sentence. In any event, a court can "exercise [its] discretion to consider a purely legal question when the record relevant to the matter is fully developed." *United States v. Northrop Corp.*, 59 F.3d 953, 958 n.2 (9th Cir. 1995).

on the applicable sentencing range. Under § 1B1.10(b)(1) of the Sentencing Guidelines, when a court decides a reduction is warranted under § 3582(c)(2), "the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) . . . had been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b)(1). In effect, the court is to go back in time in order to "substitute only the amendments . . . for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." *Id.* In 2006, the sentencing range for the grouped Counts 1–11 and 13 was 292–365 months. Amendment 782 then revised § 2D1.1(c)(2) to lower the base offense level for Wilson's drug offenses from 36 to 34, resulting in a lower sentencing range of 235–293 months, and making Wilson eligible for a sentence modification under § 3582(c)(2). It is undisputed that under the Sentencing Guidelines' grouping rules, the offense level for Counts 1–11 still applies to the grouped Counts 1–11 and 13, as it did in 2006. *See* U.S.S.G. § 3D1.3(a). Therefore, in 2015, as directed by § 1B1.10(b), the district court substituted the new base offense level of 34 into the calculation of the sentencing range for the grouped Counts 1–11 and 13. This resulted in a lower sentencing range of 235–293 months. Per the stipulation of the parties, the district court selected a mid-range of 287 months as the appropriate sentence for these counts. Given that the Guidelines calculation lowered the sentencing range for the grouped Counts 1–11 and Count 13 together, Wilson's sentence for all of these counts was modified in 2015.[3]

[3] The dissent's argument that the district court did not modify the term of imprisonment on Count 13 in 2015 because "the government and the FPD did not request any modification on Count 13," Dissent at 42, misses

Contrary to Wilson and the dissent, the manner in which the district court allocated the 287 months between Counts 1–11 and Count 13 does not change the fact that the district court substituted the new sentencing range for these grouped counts pursuant to Amendment 782 in 2015.[4]

This means that in 2019, there was nothing left for Judge Hatter to do in response to Wilson's second motion for sentence modification. Judge Hatter had already followed the directions in § 1B1.10(b)(1) in 2015, and substituted the amended § 2D1.1(c)(2) "for the corresponding guideline

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the point here. Under the Guidelines, Count 13 was grouped with Counts 1–11, so the post-Amendment 782 range of 235–293 months applies equally to Count 13, as grouped with Counts 1–11. As explained in the Guidelines, "[a]ll counts involving substantially the same harm" are "grouped together into a single Group," U.S.S.G. § 3D1.2, and the offense level applicable to that Group is the offense level "for the most serious of the counts comprising the Group," U.S.S.G. § 3D1.3(a). The term of imprisonment for the grouped counts was modified, even if the allocation of months to Count 13 was not.

[4] Like Wilson, the dissent argues that because the number of months allocated to Count 13 did not change between 2006 and 2015, Wilson is still serving the sentence imposed for Count 13 at the time of conviction. Dissent at 42. But the number of months allocated to a particular count is different from the Guidelines calculation of a sentencing range. For purposes of § 3582(c)(2), all that matters is that the district court considered and applied the lowered sentencing range associated with the grouped Counts 1–11 and 13, which it clearly did when it issued its order in 2015.

provisions that were applied when the defendant was sentenced" in 2006.[5] U.S.S.G. § 1B1.10(b)(1). The court could not go back in time and take this same step a second time in response to Wilson's present motion: there was no new version of § 2D1.1(c)(2) that could be substituted for a prior version. Therefore, Wilson is really arguing that Judge Hatter's 2015 order was erroneous because Judge Hatter did not impose a term of imprisonment for the grouped counts lower than 287 months and continued to allocate 52 consecutive months of imprisonment to Count 13. But the time for appealing the 2015 order has long passed.

District courts have limited power to modify a criminal defendant's sentence pursuant to congressional authorization in § 3582(c)(2). Wilson's current sentence is not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. § 3582(c)(2). Rather, his term of imprisonment for the grouped Counts 1–11 and 13 was already lowered by Amendment 782 in 2015, even if it was not lowered to the extent Wilson believes is appropriate. Wilson has no basis to ask for another sentence modification here. I would therefore affirm the district court's denial of Wilson's second § 3582(c)(2) motion on this ground.

[5] The Dissent's contention that the district court did not apply the reduced range to Count 13 makes no difference here. Dissent at 45 n.9. The range is for the grouped Counts 1–11 and 13. And once the new range is substituted for the pre-Amendment 782 range, the term for the whole group was changed.

VRATIL, District Judge, dissenting:

In 2006, on grouped Counts 1 through 11 and 13, Mr. Wilson received an aggregate sentence of 292 months—the low end of the effective drug guideline range under Section 2D1.1 of the Sentencing Guidelines.[1] In 2014, to remedy the severity of sentences such as Mr. Wilson's, Congress approved Amendment 782, which retroactively applies to grant a two-level reduction in drug offense levels calculated under U.S.S.G. §§ 2D1.1 and 2D1.11. As applied to Mr. Wilson, Amendment 782 reduced his guideline range on each grouped count from 292–365 months to 235–293 months. Under 18 U.S.C. § 3582(c)(2), the district court therefore had authority to modify Mr. Wilson's aggregate sentence on the grouped counts from 292 months to 235 months.

Amendment 782 authorized district courts across America to re-sentence many thousands of individuals who had received sentences calculated under U.S.S.G. § 2D1.1 before November 1, 2014.[2] In the U.S. District Court for the Central District of California, to streamline the process of modifying the sentences of these individuals, the United States Attorney

[1] For purposes of this discussion, Count 12—which held Mr. Wilson guilty of possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)—is not relevant. Under Count 12, Mr. Wilson received a 60-month term of imprisonment that the law required him to serve consecutive to his terms of imprisonment on Counts 1 through 11 and 13.

[2] Courts decided more than 50,000 motions nationwide and the United States District Court for the Central District of California received nearly 750 such motions. *U.S. Sentencing Commission 2014 Drug Guidelines Amendment Retroactivity Data Report* (May 2021), Table 1.

and the office of the Federal Public Defender ("FPD") agreed to review the huge volume of cases in which Amendment 782 might render defendants eligible for reduced sentences (possibly as low as time served effective November 1, 2015). At the conclusion of their review, and to avoid the need for each potentially affected defendant to file a stand-alone motion in his or her case, the U.S. Attorney's Office and the FPD entered into stipulations for the "limited appointment of counsel to reduce the sentences of those defendants" whom they "deemed eligible for the two-level reduction under Amendment 782." D. Ct. Dkt. 222 at 2.

On April 9, 2015, the U.S. Attorney's Office and the FPD filed a "Stipulation For Limited Appointment of Counsel and Reduction of Sentences Pursuant to 18 U.S.C. § 3582(c)(2)." D. Ct. Dkt. 215 at 1. The stipulation asked the district court to appoint the FPD to represent listed defendants "exclusively for the limited purpose of entering [the] stipulation regarding the applicability of Sentencing Guidelines Amendment 782," and "for no other purpose." *Id*. at 1–2. The parties specifically stipulated that each defendant listed on Attachment A to the stipulation (which included Mr. Wilson) was eligible for a two-level decrease in his or her total offense level and asked the district court to apply that reduction to each defendant's sentence.

Attachment A was a 33-page single-spaced spread sheet which for each of 228 defendants highlighted some but not all of the original guideline calculations: base offense level, total offense level, guideline range and sentence imposed. Attachment A then identified how Amendment 782 affected the first three guideline calculations by setting forth the reduced base offense level, the reduced total offense level and reduced guideline range. For each defendant, it concluded

with a stipulated sentence under Amendment 782. For the 193 defendants (including Mr. Wilson) who had originally received a sentence at or below the low end of the guideline range, the parties agreed to reduced sentences at the low end of the amended guideline ranges.

As to Mr. Wilson, Attachment A stipulated that under Amendment 782, he was entitled to a two-level reduction in his total offense level, placing him in a guideline range of 235 to 293 months. Attachment A noted that Mr. Wilson's original sentence was "240 [months] (+ consecutive 52-month & 60-month sentences)" and the parties recommended an amended sentence of "235 [months] (+ consecutive 52-month & 60-month sentences)." D. Ct. Dkt. 215-1 at 14. In other words, without citing the specific counts by number, the stipulation suggested that the 52-month sentence on Count 13 should be treated like the 60-month sentence on Count 12, *i.e.* they should both remain undisturbed and run consecutive because Amendment 782 did not impact them.

As the majority explains, at the original sentencing, the district court applied the guideline range to all grouped counts. The stipulation and Attachment A did not propose to do so, and they provided no information as to why the parties proposed a modification only on Counts 1 through 11 or how the court could determine an appropriate sentence without also considering Count 13. The U.S. Attorney's Office and the FPD were apparently unaware of (or ignored) how the grouping rules impacted Mr. Wilson's sentencing guidelines and the fact that the original sentence had structured Count 13 as consecutive for the sole purpose of reaching the low end of

the applicable guideline range.[3] In fact, in ruling on the stipulation, because the statutory maximum on Counts 1 through 11 was 240 months, the court could have imposed a low-end guideline sentence by running Count 13 concurrently or reducing the sentence on Count 13 to time served. Neither the stipulation nor Attachment A addressed this fact or explained to the district court why the parties believed that Count 13 should remain consecutive even though for guideline purposes, it was grouped with Counts 1 through 11 and did not need to run consecutively to reach the low end of the amended guideline range.

The U.S. Attorney's Office and the FPD did not serve the stipulation on Mr. Wilson, who was a pro se prisoner, or communicate with him about the proposed stipulation before they presented it to the district court. Furthermore, at the time it was negotiating the stipulation, the FPD did not represent Mr. Wilson.[4]

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[3] At the original sentencing, the government proposed a sentence at the high end of the guideline range on the grouped counts and sought to run Count 2 consecutive to the concurrent terms in Counts 1, 3 through 11, and 13. The district court imposed a low-end guideline sentence of 292 months and ran Count 13 consecutive to the concurrent terms in Counts 1 through 11. The district court did not explain why it chose to run Count 13 consecutively as opposed to any other count, but the choice was immaterial.

[4] The record does not reflect that the parties to the stipulation served it or Attachment A on any of the defendants listed therein, or otherwise communicated with them before they filed the stipulation. The majority assumes that the FPD consulted Mr. Wilson because, it says, he does not claim that the FPD failed to discharge its ethical obligation to consult with him about the stipulation. Maj. Op. at 9 n.3. The latter statement is technically correct, as far as it goes, but Mr. Wilson's motion for relief under 18 U.S.C. § 3582(c)(2), which is the subject of this appeal, took

To the stipulation, the parties also appended Attachment B, a proposed order which granted the requested relief. A week after it received the stipulation and without a hearing or prior notice to Mr. Wilson, on April 16, 2015, the district court entered the parties' agreed order in his case. The order appointed the FPD to represent Mr. Wilson "for the limited purpose of stipulating to reduce defendant's sentence based on Amendment 782 and for no other purpose." D. Ct. Dkt. 217 at 1.

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pains to note that "there is no indication that this stipulation was made in consultation with Mr. Wilson." D. Ct. Dkt. 252 at 4 n.2. And at oral argument, defense counsel, an assistant FPD, candidly admitted that the FPD did not speak to Mr. Wilson before it entered the stipulation on his behalf.

The FPD was appointed for the "limited purpose" of "stipulating to reduce defendant's sentence of imprisonment based on Sentencing Guidelines Amendment 782," which the U.S. Attorney and the FPD agreed only applied to Counts 1 through 11. The district court did not appoint the FPD to seek a plenary resentencing for Mr. Wilson or even to ask for relief beyond the stipulated reductions, which did not include any reduction on Count 13. D. Ct. Dkt. 217 at 1. The fact that Amendment 782 authorized the district court to make a "limited adjustment" on all grouped counts does not mean that the FPD undertook to represent Mr. Wilson in seeking relief on Count 13. Because the government and the FPD agreed to the maximum reduction permitted on the counts that the parties understood Amendment 782 impacted (Counts 1 through 11), the FPD apparently concluded that prior consultation with Mr. Wilson was unnecessary. In any event, the record refutes any suggestion that in the context of the mass re-sentencing environment which prevailed in the aftermath of Amendment 782, the FPD had a traditional attorney-client relationship with Mr. Wilson or the other 227 defendants whom it purported to represent. I do not suggest that the FPD proceeded inappropriately. I only highlight the reality of the monumental task that the FPD faced in efficiently seeking relief on behalf of numerous defendants and the lack of prior consultation with Mr. Wilson, given the limited scope of its representation.

The agreed order recited that the district court had considered the eligibility criteria for Mr. Wilson's sentence reduction, as well as "the factors set forth in 18 U.S.C. § 3553(a)" and the "post-sentencing conduct of . . . defendant." *Id*. at 2. The district court then reduced Mr. Wilson's sentence on Counts 1 through 11 by five months, to 235 months, exactly as the stipulation proposed. Consistent with the stipulation, the district court also noted that "[a]ll other provisions of the last judgment issued shall remain in effect." *Id*. at 3. The agreed order specifically noted that the new aggregate term of imprisonment of 347 months included consecutive sentences of 52 months on Count 13 and 60 months on Count 12. Despite the fact that the original sentencing judge had applied the guideline range to all grouped counts, the agreed order—like the stipulation and Attachment A—did not address why the district court should modify the sentences only on Counts 1 through 11 and disregard Count 13, the other grouped count.

After the fact, at some point, Mr. Wilson learned of the stipulation and district court order. On March 20, 2018, he filed a pro se motion ("the 2018 motion") to reconsider it, which asked the court for relief on Count 13. The motion argued that if his offense level went down two levels, the low end of the guideline range would be 235 months and the 52 months on Count 13 would not need to run consecutively. He complained that by failing to include Count 13 as part of the grouped counts, "the full 2-level deduction was not accomplished" by the court order of 2015. D. Ct. Dkt. 218 at 3. He also asked the district court to consider a reduced sentence based on his "post-conviction achievements" under Section 3353(a)(1) and (2). *Id*. at 3–4.

The U.S. Attorney and FPD filed a joint response to Mr. Wilson's motion for reconsideration. In it, they verbally explained the numerical calculations on Attachment A, as applied to Mr. Wilson, and reiterated their stipulation that Amendment 782 entitled him to a two-level reduction in his total offense level on Counts 1 through 11. They did not acknowledge his argument that the stipulation and resulting sentence had denied him the benefits that Amendment 782 was intended to confer, or that his post-conviction conduct warranted further relief. Moreover, they submitted no legal or factual argument contrary to Mr. Wilson's position.

On July 3, 2018, the district court denied Mr. Wilson's pro se motion for reconsideration, holding that (1) Count 13 (the firearm count under Section 922(g)) carried a mandatory sentence of 52 months consecutive to the drug-related sentences and (2) because "Amendment 782 served only to reduce the total offense level of the drug convictions," it had "no effect" on Count 13. D. Ct. Dkt. 224 at 1–2. Perhaps because it believed that Count 13 carried a mandatory consecutive sentence, the district court did not address Mr. Wilson's argument that Count 13 should have been grouped with Counts 1 through 11 and that the sentence of 235 months should apply to all of the grouped counts. Also, it did not address Mr. Wilson's request to consider his post-conviction "achievements."

As to Mr. Wilson, the FPD later repented of its role in the stipulation and concluded that under Amendment 782, he was actually eligible for relief on all of the grouped counts—Counts 1 through 11 *plus* Count 13—so that "[w]hat should have been a total 57-month reduction resulted in a five-month reduction." D. Ct. Dkt. 252 at 3. Therefore, on October 28, 2019, under 18 U.S.C. § 3582(c)(2), it entered an

appearance for Mr. Wilson and filed a motion to reduce his sentence on Count 13 ("the 2019 motion"). The motion asked that Mr. Wilson's sentence on Count 13 run concurrently rather than consecutively. In doing so, it argued that Section 3582(c)(2) and Amendment 782 authorized a reduced sentence on Count 13, that the proposed reduction was consistent with applicable policy statements of the Sentencing Commission and—citing Section 3553(a)—that Mr. Wilson deserved a reduction because he was a "model prisoner who [was] committed to his successful rehabilitation." D. Ct. Dkt. 252 at 8.

The United States opposed the motion and asked the district court to construe it as a successive, unauthorized, garden-variety petition for relief under 18 U.S.C. § 2255, and—so construed—to dismiss it for lack of jurisdiction. In its opposition, the government did not defend the district court's 2018 holding that Count 13 was *required* to run consecutive to Counts 1 through 11. D. Ct. Dkt. 259 at 4 (court was "well within its authority" to impose consecutive sentence on Count 13). It did not claim that if the subject motion was not a successive Section 2255 motion disguised as a Section 3582(c)(2) motion, Mr. Wilson was ineligible for relief under 18 U.S.C. § 3582(c)(2). It did not address—let alone dispute—Mr. Wilson's claim to be a model prisoner with many post-conviction achievements. Its defense of the 2015 stipulation was half-hearted if not incomprehensible. Furthermore, it did not claim that the stipulation barred Mr. Wilson from seeking further relief under 18 U.S.C. § 3582(c)(2), or that he had prior knowledge of—or consented to—the stipulation.

On January 22, 2020, the district court overruled Mr. Wilson's motion for relief under 18 U.S.C. § 3582(c)(2).

In a three-page order, it held that (1) Mr. Wilson did not cite any authority for his claim that Amendment 782's changes to the drug quantity thresholds of Section 2D1.1 had "any effect" on Count 13, so he was ineligible for relief under 18 U.S.C. § 3582(c)(2); and (2) even if Mr. Wilson were eligible for a reduced sentence on Count 13, the court after "consider[ing] the factors set forth in 18 U.S.C. § 3553 and, *inter alia*, the nature of Wilson's crimes . . . decline[d] to exercise its discretion to resentence him." D. Ct. Dkt. 261 at 2–3.

The majority affirms.

I respectfully dissent because I would find that when the FPD filed the 2019 motion which is the subject of this appeal, Mr. Wilson was still serving his 2006 sentence on Count 13 and—because Amendment 782 subsequently lowered the sentencing range for that count—he was eligible for a reduced sentence under 18 U.S.C. § 3582(c)(2). I believe that the district court misapprehended the law when it held that Mr. Wilson was ineligible for relief under 18 U.S.C. § 3582(c)(2) because the original sentence on Count 13 was not "based on" Section 2D1.1 of the guidelines, which Amendment 782 subsequently lowered. I would also hold that the district court did not adequately explain its conclusion that even if Mr. Wilson were eligible for relief on Count 13, it would nevertheless deny such relief.

I express these views with hesitation and great respect for the district court and its well-intentioned efforts to deal with an avalanche of sentencing modifications that followed in the wake of Amendment 782. And as a senior judge with decades of experience in the sentencing trenches, I think twice before faulting a colleague's contribution to the onerous

process of dispensing justice in the face of massive and unrelenting caseloads. In the unique context of Mr. Wilson's case, however, I believe that he has yet to receive a legally sufficient explanation why his sentence on Count 13 should not run concurrently with the sentences on Counts 1 through 11 or why his extraordinary post-conviction record does not warrant discussion, let alone entitle him to some degree of relief. Accordingly, while I appreciate the lengthy and thorough analysis of the majority opinion and concurrence, I am unpersuaded.

Availability Of Relief Under Amendment 782

The majority declines to address the district court's conclusion that Amendment 782 does not apply to a grouped firearm offense such as Count 13. The concurrence finds that this appeal can be decided solely on the ground that in 2019, defendant was not eligible for relief on Count 13 because he had already been resentenced in 2015. Before addressing the concurrence's reasoning, I explain my belief that the district court incorrectly determined that Amendment 782 did not apply to Count 13.

The district court found defendant ineligible for relief on Count 13 because it was a firearms offense, not a drug offense.[5] Under Section 3582(c)(2), however, the nature of

[5] In denying Mr. Wilson's 2018 motion to reconsider, the district court held that "the two firearm counts carried *mandatory* sentences of sixty and fifty-two months, respectively, to run *consecutively* to the drug related sentence." D. Ct. Dkt. 224 at 1 (emphasis added); *see id.* at 2 ("Amendment 782 had no effect on the sentence[s] based on the § 922(g) [Count 13] or § 924(c) [Count 14] convictions"). In fact, while Section 924(c) required that the sentence on Count 12 run consecutive to

the underlying offense is immaterial. The only question is whether defendant's term of imprisonment on each count was "based on" a guideline range that Amendment 782 subsequently lowered. 18 U.S.C. § 3582(c)(2).

Under U.S.S.G. § 3D1.2, defendant's firearm conviction (Count 13) was grouped with his drug convictions (Counts 1–11). The U.S. Probation Office calculated the offense level for that group based on the guideline for drug offenses, U.S.S.G. § 2D1.1. In Mr. Wilson's case, the resulting guideline range was 292 to 365 months. Statutory maximums on each of the individual counts prevented the district court from imposing such a long sentence on any of the grouped counts. Therefore, to structure an aggregate sentence within the guideline range, the Sentencing Guidelines instructed the district court to stack Mr. Wilson's term of imprisonment on Count 13 (or any of the grouped counts) on top of the terms of imprisonment for the remaining grouped counts. *See* U.S.S.G. § 5G1.2(d) (if sentence imposed on count carrying highest statutory maximum less than total punishment, then sentence imposed on one or more other counts shall run consecutively to extent necessary to produce combined sentence equal to total punishment). Accordingly, to achieve a low end guideline sentence of 292 months, the district court imposed concurrent statutory-maximum sentences of 240 months on each of Counts 1 through 11 and a consecutive sentence of 52 months on Count 13, for an aggregate sentence of 292 months on the grouped counts.

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the sentences on the remaining counts, Section 922(g) did not require a consecutive sentence on Count 13.

The record is undisputed that at the time of sentencing, the guideline range determined under U.S.S.G. § 2D1.1 served as the "basis for the court's exercise of discretion in imposing" the terms of imprisonment on each of Counts 1 through 11 and 13, including its decision to run the sentence on Count 13 consecutive to the other counts.[6] *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018); *see Freeman v. United States*, 564 U.S. 522, 530 (2011) (court may revisit sentence to extent sentencing range was "relevant part of the analytic framework the judge used to determine the sentence"). Therefore, Amendment 782 applied to all grouped counts, whether—viewed independently and in isolation from the other counts—they were drug offenses or firearm offenses. *See United States v. Collazo-Santiago*, 637 F. App'x 951, 952 (7th Cir. 2016) (firearm sentence eligible for reduction because firearm conviction under Section 922(g)(1) grouped with drug conviction under § 3D1.4 and therefore was "based on" guideline range that was subsequently lowered); *United States v. Alvira-Sanchez*, 804 F.3d 488, 491 n.1, 495–96 (1st Cir. 2015) (Amendment 782 reduced sentencing range on drug counts and grouped firearm count under 18 U.S.C. § 924(a)(4) which required consecutive sentence but did not require term of imprisonment); *see also United States v. Torres*, 856 F.3d 1095, 1097, 1099 (5th Cir. 2017) (after grouping under U.S.S.G. § 3D1.2(c), "the money-laundering offense level was entirely dependent on the drug-trafficking" offense level; because "Section 3582(c)(2) refers specifically to sentencing range, not any given offense," "[i]f a reduction was appropriate for the drug-trafficking offense levels [under

[6] In its brief, even the government concedes that after grouping, the calculated base offense level for Counts 1 through 11 and 13 was "based on the Drug Quantity Table found at USSG § 2D1.1."

Amendment 782], then it was appropriate for [the] money-laundering [offense] as well").

As I read these authorities, the district court had clear authority to modify the term of imprisonment on the non-drug count, so long as the term of imprisonment on that count was based on a guideline range calculated under U.S.S.G. § 2D1.1. Common sense supports this conclusion. Where the grouping rules required the district court to apply the guideline range calculated under Section 2D1.1 to a "non-drug" offense, Mr. Wilson should not be denied the benefit of a guideline amendment that reduces that very same range. This is not to say that Mr. Wilson was categorically entitled to relief under Amendment 782 and 18 U.S.C. § 3582(c)(2). But he was not ineligible for relief in the situation where the Sentencing Guidelines correctly grouped his firearm offense with his drug offenses.

The concurrence proposes to decide the eligibility question on the narrower ground that the district court resentenced Mr. Wilson on all grouped counts in 2015, so that Amendment 782 did not subsequently lower the guideline range which applied to Count 13. Likewise, the majority states that the district court "imposed"—presumably in 2015—a "287-month term" for grouped Counts 1 through 11 and 13. Maj. Op. at 18. I must disagree with these conclusions. The law is well established that a modification of the term of imprisonment on some counts does not result in a new "term of imprisonment" on all counts. 18 U.S.C. § 3582(c)(2).

First, as a practical matter, and as we see in this case, the Judgment and Commitment Order in a multi-count case typically "commits" defendant to the custody of the Bureau

of Prisons to be imprisoned for an over-arching number of specified months. D. Ct. Dkt. 135 at 1 ("defendant . . . is hereby committed on Count 1 through 13 . . . to the custody of the Bureau of Prisons to be imprisoned for a term of 352 months"). Likewise, in 2015, the district court's agreed order referred to reducing defendant's aggregate sentence of imprisonment to 347 months. This language tells the BOP the overall length of the sentence to which defendant is subject. Even so, "[s]entences in multiple-count cases are 'imposed independently' for each count of conviction." *United States v. Martin*, 974 F.3d 124, 135 (2d Cir. 2020); *see Dean v. United States*, 137 S. Ct. 1170, 1175–76 (2017) (§ 3553(a) factors considered to determine "a prison *sentence for each individual offense* in a multicount case" and set "length of separate prison terms and an aggregate prison term comprising *separate sentences* for multiple counts of conviction") (emphasis added); *see also* U.S.S.G. § 5G1.2(b) (court shall determine "the total punishment and shall impose that total punishment on each such count"); 18 U.S.C. § 3584(a), (c) (to determine treatment of sentences on multiple counts (or in multiple cases) as concurrent or consecutive, refers to "multiple terms of imprisonment" even though "for administrative purposes," sentences are treated as "a single, aggregate term of imprisonment"); D. Ct. Dkt. 135 at 1 (term of commitment to BOP custody consists of total of enumerated terms of imprisonment on each count).

At resentencing, a court may only modify sentences on counts that have been impacted by specific statutory authorizations or retroactive sentencing amendments. *See Martin*, 974 F.3d at 136 ("Aggregation for administrative purposes does not imply that every sentence imposed may be modified based on an authorization to modify one component part."); *see also id.* at 137 ("Section 3584(c) provides no

textual support for the position that sentences may be aggregated for the purpose of resentencing, nor has any court interpreted the statute in such a fashion."). In 2015, in approving the stipulation to reduce Mr. Wilson's sentence on Counts 1 through 11, the district court could have reduced or altered Mr. Wilson's term of imprisonment on Count 13. But at the parties' request, it did not do so. I would therefore hold that on Count 13, Mr. Wilson is still serving the "sentence of imprisonment imposed upon him at the time of his conviction." *United States v. Trujillo*, 713 F.3d 1003, 1006 (9th Cir. 2013).[7]

I disagree with the concurrence's conclusion and the majority's suggestion that when the district court modified Mr. Wilson's sentence on Counts 1 through 11 and reduced his aggregate sentence, it necessarily resentenced him on Count 13. "By its terms, § 3582(c)(2) does not even authorize a sentencing or resentencing proceeding. Instead, it provides for the 'modif[ication of] a term of imprisonment.'" *Dillon v. United States*, 560 U.S. 817, 825

[7] The concurrence cites several authorities which rely on the general principle that "when a defendant is serving a term of imprisonment that has been modified pursuant to § 3582(c)(2), his sentence is 'based on' the guideline range applied at his most recent sentence modification, rather than the range applied at his original sentencing." *United States v. Derry*, 824 F.3d 299, 301 (2d Cir. 2016); *see United States v. Banks*, 770 F.3d 346, 348 (5th Cir. 2014); *United States v. Tellis*, 748 F.3d 1305, 1309 (11th Cir. 2014). This principle applies here, as to each of Counts 1 through 11, because defendant is currently serving a term of imprisonment based on Amendment 782 and the 2015 order. As to Count 13, however, defendant is serving the term of imprisonment originally imposed in 2006. The authorities cited by the concurrence do not address whether a court can consider a Section 3582(c)(2) motion if a prior order granted relief on some counts but (1) did not address all counts that the sentencing amendment impacted or (2) denied relief on other counts.

(2010). As noted above, the district court held that Amendment 782 did not apply to Count 13. The record is clear that in 2015, when the district court modified Mr. Wilson's terms of imprisonment on Counts 1 through 11, its order did not have the purpose or intended effect of imposing a new sentence or "term of imprisonment" on Count 13, let alone a "sentencing" or "re-sentencing" on that count. *See id.* at 825–26 (Congress intended to authorize only limited adjustment to otherwise final sentence and not plenary resentencing proceeding; court does not impose "new sentence in usual sense," but merely reduces otherwise final sentence in limited circumstances). If the record were otherwise ambiguous on this point, the district court has resolved that ambiguity by expressly stipulating that the 2015 sentence modification on Counts 1 through 11 left the sentence on Count 13 "undisturbed." D. Ct. Dkt. 261 at 2 ("This Court resentenced Wilson to 235 months for his drug convictions and left the sentences on the firearm counts undisturbed."); *see* D. Ct. Dkt. 224 at 2 ("Amendment 782 had no effect on the sentence[s] based on the § 922(g) [Count 13] or § 924(c) [Count 12] convictions."). Likewise, in the district court, the government *conceded* that Mr. Wilson's present request for relief is a request to modify the original sentence on Count 13 which was imposed in 2006. D. Ct. Dkt. 259 at 5 (arguing that district court should dismiss Mr. Wilson's Section 3582(c)(2) motion because in reality, it was Section 2255 motion which sought to modify the "*original sentence* on [Count 13] to have it run concurrently rather than consecutively") (emphasis added).

The concurrence states that because "the Guidelines calculation lowered the sentencing range for the grouped Counts 1-11 and Count 13 together," Mr. Wilson's "sentence" and "term" for all of the grouped counts was

"modified" and "changed" in 2015. Concurrence at 23, 25 n.5. The grouping rules in the Guidelines do not transform or aggregate specific terms of imprisonment on multiple counts into a single term of imprisonment on all grouped counts. Instead, the Guidelines merely give an advisory range that applies to *each* grouped count and then recommends whether to run the term of imprisonment on *each* count consecutive to or concurrent with the other counts. Given that the government and the FPD did not request any modification on Count 13 and the district court left the 52-month term of imprisonment on that count unchanged, I cannot agree that the district court "modified" or "changed" the term of imprisonment on Count 13. Even if, as the majority and concurrence find, the district court "imposed" a "287-month term" for all grouped counts, Maj. Op. at 18; Concurrence at 21, 25, such a ruling would constitute an implicit denial of relief to modify the "term of imprisonment" on Count 13. As such, Mr. Wilson would be entitled to again ask for relief on that count. *See Trujillo*, 713 F.3d at 1006–07.

In summary, in 2019, Mr. Wilson was serving the term of imprisonment which the district court imposed on Count 13 in 2006. He is still serving that term of imprisonment. Amendment 782 "subsequently" lowered the guideline range that applied to that count. The 2015 stipulation and the district court's order awarding relief on Counts 1 through 11 do not bar Mr. Wilson from seeking relief on Count 13.[8]

[8] The concurrence faults Mr. Wilson for failing to appeal the 2015 order and suggests that in this appeal he is attempting to argue that the 2015 order was erroneous. Concurrence at 25. Again, the 2015 stipulation only requested relief on Counts 1 through 11 and noted that the sentences on Counts 12 and 13 should remain the same. Because the

Even if the district court in 2015 had expressly denied relief on Count 13, Mr. Wilson would not be precluded from filing a second request for relief on that count.

District Court's Explanation of the Sentencing Decision

As noted, the district court held that even if defendant were eligible for relief under Amendment 782, it would deny such relief. Specifically, without elaboration, it explained that it declined to exercise its discretion to grant relief after "having considered the factors set forth in 18 U.S.C. § 3553 and, *inter alia*, the nature of Wilson's crimes." D. Ct. Dkt. 261 at 3. In my view, this explanation does not show that the district court properly exercised its discretion under 18 U.S.C. § 3553(a) and does not afford this court an adequate basis for review.

A district court must consider the Section 3553(a) factors "both in the initial imposition of a sentence and in any subsequent reduction of a sentence after the modification of a guidelines range by the Sentencing Commission." *Trujillo*, 713 F.3d at 1009; *cf. Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018) (assuming for argument's sake that district courts have equivalent duties at initial sentencing and when later modifying sentence). "The district court's duty to consider the § 3553(a) factors necessarily entails a duty to provide a sufficient explanation of the sentencing decision to permit meaningful appellate review." *Trujillo*, 713 F.3d

district court granted the requested relief and the parties did not seek relief on Count 13, an appeal of the 2015 or order would have been fruitless. In his present appeal, Mr. Wilson is challenging the 2020 order which denied relief on Count 13, a count which the 2015 stipulation and order did not impact.

at 1009 (citing *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc)).

The sentencing court is not necessarily required to discuss every factor because even if a judge never mentions Section 3553(a), "it may be clear from the court's experience and consideration of the record that the factors were properly taken into account." *Id.* (citing *Carty*, 520 F.3d at 995–96). "[T]he judge need not provide a lengthy explanation if the 'context and the record' make clear that the judge had 'a reasoned basis' for reducing the defendant's sentence." *Chavez-Meza*, 138 S. Ct. at 1966 (quoting *Rita v. United States*, 551 U.S. 338, 356, 359 (2007)). The length of a judge's explanation at resentencing is mostly left to his or her "own professional judgment." *Id.* (quoting *Rita*, 551 U.S. at 356). Even so, as the majority notes, we must evaluate the court's explanation in a sentence modification proceeding in light of the initial sentencing, the court's awareness of defendant's arguments, its consideration of the relevant sentencing factors, and the intuitive reason for choosing a particular sentence. *Id.* at 1967–68. In *Trujillo*, the district court erred when it declined to reduce defendant's sentence without addressing the non-frivolous arguments under Section 3553(a) that he had presented in his memorandum. 713 F.3d at 1008, 1011; *see id.* at 1010 (district court must set forth enough detail to show it considered parties' arguments and had reasoned basis for exercising legal decisionmaking authority) (citing *Rita*, 551 U.S. at 356).

Here, under *Chavez-Meza* and *Trujillo*, I would find that the district court's explanation was insufficient. Among other things, it did not adequately explain (1) under the Guidelines, why the term of imprisonment on Count 13 should not run concurrently with the sentences on Counts 1 through 11;

(2) what weight, if any, the district judge gave to Mr. Wilson's unrefuted evidence of post-sentencing rehabilitation and non-frivolous argument for relief under Section 3553(a)(1), or (3) "a reasoned basis" for imposing a sentence near the high end of the range on the grouped counts, *Chavez-Meza*, 138 S. Ct. at 1966 (quoting *Rita*, 551 U.S. at 356). *See Trujillo*, 713 F.3d at 1010 (rejecting government assertion that because order began, "Having reviewed the papers submitted to the court," district court adequately and thoroughly considered the record).

In *Chavez-Meza*, the district court found that Amendment 782 lowered the relevant guideline range. The district court reduced defendant's sentence by 21 months instead of the maximum 27 months that Amendment 782 authorized. *See Chavez-Meza*, 138 S. Ct. at 1964–65 (reducing sentence from 135 months to 114 months rather than 108 months—the low end of the amended guideline range—as defendant requested). In *Chavez-Meza*, the very nature of the district court decision—granting substantial but not all relief—did not demand more than a summary explanation. In contrast, the district court in Mr. Wilson's case denied all relief. In doing so, it explained its reasoning on the Section 3553(a) factors in alternative form after having concluded—erroneously, in my view—that Amendment 782 did not apply to Count 13.[9]

[9] The majority states that "[t]he parties do not argue that [the district court] applied an incorrect Guidelines range in 2015 for the entire group, and the new term of 287 months is within the range." Maj. Op. at 18 n.5. But the question is not whether the district court correctly calculated the reduced guideline range of 235 to 293 months in 2015. The question is whether it applied that range to all grouped counts. On this point, the parties agree that in 2015, the district court did not apply the reduced guideline range to Count 13—it only did so as to Counts 1 through 11.

The correctly calculated guideline range is "the starting point and the initial benchmark," *Gall v. United States*, 552 U.S. 38, 49 (2007), of an appropriate sentence to carry out the objectives of Section 3553(a). *Rita*, 551 U.S. at 348. "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6. The district court's mistaken assumption that Amendment 782 did not reduce Mr. Wilson's guideline range on Count 13 may have very well influenced its alternative decision to deny relief. *See United States v. Munoz-Camarena*, 631 F.3d 1028, 1030–31 (9th Cir. 2011) ("A district court's mere statement that it would impose the same . . . sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial determination of the correct Guidelines range."); *see also United States v. Gardenhire*, 784 F.3d 1277, 1283–84 (9th Cir. 2015) (district court later statement on bail motion that applying Section 3553(a) factors, "it would impose the same sentence even if [Guidelines calculation was incorrect] does not render the procedural error harmless").

As the majority notes, a statement of reasons can be "brief but legally sufficient" and fall easily within the scope of "the judge's own professional judgment." *Rita*, 551 U.S. at 356, 358. I laud the deference which the majority affords to the experience and judgment of federal district judges. At some point, however, this deference must yield to reality and common sense. Courts of appeal must patrol the boundaries of procedural fairness and remind themselves that deferential standards of review have real consequences for real people. In Mr. Wilson's case, he will serve 52 additional months in prison for reasons that—I respectfully submit—are not clear.

Even at this stage, based in part on the parties' incomplete analysis of which grouped counts were eligible for sentencing modification, Mr. Wilson has not received the individualized and demonstrably considered judgment which the law requires. If the district court had believed that Amendment 782 entitled Mr. Wilson to seek relief on Count 13, as I believe it does, the court would presumably have exercised its discretion to consider the remedial purposes of that amendment, as well as Mr. Wilson's post-conviction conduct. *See generally United States v. White*, 984 F.3d 76, 89–90 (D.C. Cir. 2020) (review of district court discretion under First Step Act, which makes "possible fashion[ing of] the most complete relief possible," must take into account Congressional purposes in passing legislation) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)). Moreover, remanding this case for further proceedings under Section 3582(c)(2), which would not even require a hearing, would impose a negligible burden on the judicial system.[10]

In sum, under *Chavez-Meza* and *Trujillo*, the district court did not adequately explain—and the record does not otherwise reveal—why if Amendment 782 applied to Count 13, the district court would deny relief and sentence Mr. Wilson near the high end of the amended guideline range on the grouped counts.

I respectfully dissent.

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[10] Because I would find that the district court did not adequately explain its alternative conclusion that it denied all relief based on the Section 3553(a) factors, I conclude that the record is not sufficiently developed to determine whether the district court's denial of all relief was substantively reasonable.