CA NO. 16-50095

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANDRE FRANKLIN, Defendant-Appellant.	DC# CR 15-00067-DSF

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DALE S. FISCHER
United States District Judge

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I.

STATEMENT OF JURISDICTION

This appeal is from a conviction for possession with intent to distribute at least 28 grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B)(iii). The district court had jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under 28 U.S.C. § 1291. Mr. Franklin was sentenced on February 22, 2016, ER 2-6, 7-23, and filed a notice of appeal on March 29, 2016, ER 1, which was timely after an extension of the deadline for excusable neglect, *see* CR 52.

II.

STATEMENT OF ISSUES PRESENTED

A. IS A WAIVER OF APPEAL PROVISION IN THE PLEA AGREEMENT UNENFORCEABLE BECAUSE THE GOVERNMENT BREACHED THE PLEA AGREEMENT BY (1) AGREEING THAT A HIGHER PRESENTENCE REPORT BASE OFFENSE LEVEL RECOMMENDATION WAS TECHNICALLY ACCURATE AND (2) USING THAT TO ARGUE FOR AN OTHERWISE INAPPLICABLE SPECIFIC OFFENSE CHARACTERISTIC?

B. DID THE DISTRICT COURT ERR IN NOT RECOGNIZING IT COULD ADJUST THE 5-YEAR STATUTORY MANDATORY MINIMUM REQUIRED BY 21 U.S.C. § 841(b)(1)(B) FOR THE TIME MR. FRANKLIN SERVED ON A COMPLETED STATE SENTENCE FOR RELATED OFFENSE CONDUCT?

Pursuant to Circuit Rule 28-2.7, the pertinent statutory and guidelines provisions are set forth in the Statutory Appendix.

III.

BAIL STATUS OF DEFENDANT

Mr. Franklin is presently serving the 60-month sentence imposed by the district court. His projected release date is July 5, 2019.

IV.

STATEMENT OF THE CASE

On January 7, 2013, a confidential informant called Mr. Franklin and asked Mr. Franklin to sell him 1.25 ounces of crack for $1,000. PSR, ¶ 8. Mr. Franklin sold the informant the crack the next day. PSR, ¶ 9. The actual weight of the crack in grams was 32.5 grams, PSR, ¶ 9, which triggers a 5-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B).

One week later, officers executed a search warrant at Mr. Franklin's residence. PSR, ¶ 11. The officers forced entry after they heard someone running inside the residence, observed Mr. Franklin running toward the bathroom, and grabbed him as he was trying to flush crack down the toilet. PSR, ¶ 11. The officers recovered 103 grams of crack and also found a gun under the mattress in Mr. Franklin's bedroom. PSR, ¶ 12.

Mr. Franklin was arrested, charged in state court with possession for sale of the 103 grams of crack found in the residence, and almost immediately pled guilty. *See* ER 41; PSR, ¶ 45. He was sentenced to 4 years in state prison. ER 42; PSR, ¶ 45. He was released early, for general good behavior and participation in a fire camp program, after serving 18 months. ER 42-43.

In addition to doing well in prison, Mr. Franklin did well after being released. As summarized in the defense sentencing memorandum – with support from the presentence report and the accompanying sentence recommendation letter:

> He obtained training in dealing with hazardous material, OSHA standards and Refinery safety. He applied for work at various oil refineries and has received certificates in HAZMAT, OSHA and RSO training. His employment at A-1 Metal Polishing was

> a success. His employer said Mr. Franklin was a "good worker" and that he would be rehired.

ER 43. *See also* PSR, ¶¶ 77, 79, 80; Recommendation Letter,[1] at 4-5.

Mr. Franklin's transformation was interrupted when the government filed the indictment in this federal case on February 20, 2015. The indictment charged Mr. Franklin, more than two years after the fact, with (1) distribution of the crack sold to the informant on January 8, 2013, in violation of 21 U.S.C. § 841(a)(1); (2) possession of the gun found in the residence on January 15, 2013 in furtherance of possession with intent to distribute the crack found that day, in violation of 18 U.S.C. § 924(c)(1)(A)(i); and (3) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). ER 62-65. Mr. Franklin was arrested, arraigned on the indictment, and detained without bail on February 26, 2015. CR 12, 16.

Several months later, the parties entered into a plea agreement. ER 45-61. Mr. Franklin agreed to plead guilty to the charge of distribution of crack on January 8, 2013, ER 45-46, and the government agreed to (1) dismiss the other charges and (2) not file a prior conviction enhancement information under 21 U.S.C. § 851, ER 46-47. The parties also agreed on a sentencing guidelines base offense level of 24. ER 52.

Mr. Franklin thereafter entered his guilty plea, RT(8/3/15) 5-36, and the court referred the matter to the probation office for preparation of a presentence report, *see* RT(8/3/15) 37. The probation office disagreed with the parties' agreement on the base offense level. It recommended the court treat the crack

[1] "Recommendation Letter" refers to the October 12, 2015 probation office recommendation letter filed with the presentence report.

found in the house on January 15, 2013 as "relevant conduct" under § 1B1.3(a)(2) of the guidelines, opining it was "part of the same course of conduct or common scheme or plan" as the sale to the informant on January 8, 2013. PSR, ¶ 20.[2] This made the base offense level 26 rather than 24. PSR, ¶ 21.[3] The probation office also recommended the court increase the offense level by 2 more levels for possession of a dangerous weapon, under § 2D1.1(b)(1), based on the gun which was found in the January 15, 2013 search.[4] *See* PSR, ¶¶ 22-23. The probation office did acknowledge that consideration of this additional conduct made it appropriate to depart for the time previously served in state custody for the drugs found on January 15, 2013 and did recommend that departure. *See* PSR, ¶ 105 (citing U.S.S.G. § 5K2.23); Recommendation Letter, at 5 (same). These recommendations, combined with Mr. Franklin's criminal history category of IV,

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[2] Section 1B1.3 is entitled "Relevant Conduct" and controls the determination of base offense levels, specific offense characteristics, and adjustments under Chapter Three. *See* U.S.S.G. § 1B1.3(a). For drug offenses like Mr. Franklin's, it requires the court to include conduct "that [was] part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2).

[3] 24 is the base offense level for between 28 and 112 grams of crack, *see* U.S.S.G. § 2D1.1(c)(8), so it would be the correct base offense level if the 32.5 grams sold to the informant alone is considered. 26 is the base offense level for between 112 and 196 grams of crack. *See* U.S.S.G. § 2D1.1(c)(7). Adding the 103 grams of crack found in the house on January 15, 2013 to the 32.5 grams sold to the informant a week earlier made the total quantity 135.5 grams and thereby triggered the higher base offense level.

[4] Section 2D1.1(b)(1) is a specific offense characteristic which provides that "[i]f a dangerous weapon (including a firearm) was possessed, increase by **2** levels." Such specific offense characteristics are controlled by the relevant conduct rules just like base offense levels, as noted *supra* n.2.

see PSR, ¶ 47, led to a specific sentence recommendation of 66 months. *See* Recommendation Letter, at 1.

In its subsequently filed sentencing memorandum, the government did not recommend the base offense level of 24 agreed to in the plea agreement. It instead "submit[ted] that the USPO's calculations are technically accurate." ER 35. It agreed with the probation officer's rationale, stating:

> Under U.S.S.G. § 1B1.3(a)(2), the January 15, 2013, conduct is considered to be relevant conduct to the January 8, 2015, sale of crack cocaine (the offense to which defendant has pleaded guilty) because the January 15, 2013, acts committed by defendant were part of the same course of conduct and they are of a character that would require the grouping of multiple counts under § 3D1.2(d) (see PSR, ¶¶ 18, 20).

ER 36. The government also agreed with the 2-level gun enhancement recommended by the probation office. *See* ER 36. The government did not recommend a departure for the full 18 months Mr. Franklin had served in state custody under § 5K2.23 and expressly disagreed with that recommendation in oral argument at the sentencing hearing, *see* ER 13. What the government recommended instead was using the time served in state custody as justification for a variance to the guideline range produced by a base offense level of 24. ER 35. It stated the lower base offense level "more appropriately provides overall just punishment for defendant's conduct because defendant has already been convicted in state court and served an 18-month sentence for the 103 grams of crack cocaine that was found in his residence on January 15, 2013." ER 36. Put another way in the next paragraph, "because defendant was previously convicted and already served an 18-month sentence for the 103 grams of crack cocaine found in his residence, the government submits that his base offense level should not incorporate the 103 grams of crack cocaine found in his residence, and that he

should only be punished for the 32.5 grams of crack cocaine he sold to the CI on January 8, 2013." ER 36. The government then recommended a sentence of 70 months. ER 36-37.

Defense counsel, in a sentencing memorandum filed the same day as the government sentencing memorandum, acquiesced in the presentence report's offense level calculation and focused on the departure recommended for the time already served in state custody. *See* ER 42.[5] He argued Mr. Franklin was entitled to an offset for the 18 months he had served in state custody and argued he should receive even more of an offset than the time actually served, because "[i]t would be unjust to minimize the degree of variance/offset for his prior prison term due to the early release which he earned for his good behavior and participation in the fire camp program." ER 43. He concluded: "The lowest sentence [Mr. Franklin] can receive by crediting the federal sentence with the state time and varying to account for his good behavior in state prison is reasonable." ER 44.

Several months later, the parties appeared for sentencing. The defense attorney began by noting three of Mr. Franklin's prior convictions for possession of drugs had been reduced to misdemeanors since the presentence report had been prepared. ER 10. *See also* CR 41, 42. The attorney also explained how Mr. Franklin's service at the fire camp had reduced the time he served in state custody:

> [O]ne of the reasons why he got a 18-month sentence instead of

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[5] The guideline defense counsel cited was § 5G1.3, which is incorporated by reference in the guideline cited in the presentence report – § 5K2.23. As discussed further below, in the argument section of this brief, § 5G1.3 applies when the sentence for the relevant conduct has not been fully served – or, in the language of the guideline, is "undischarged" – and § 5K2.23 applies when the sentence has been fully served – or "discharged." Section 5K2.23 expressly incorporates the test of § 5G1.3(b). *See* U.S.S.G. § 5K2.23.

> serving all 24 months is because he was a model inmate. He was in the fire camp. And because he was in the fire [camp], instead of serving half of his time, he did get a six-month reduction.

ER 11. Next, the attorney summarized the additional mitigating factors he had argued in his sentencing memorandum:

> He got training in three separate areas. He had two jobs. He has a job waiting for him when he gets out of prison.
>
> * * *
>
> Mr. Franklin has transformed his conduct. He is in a situation where when he is released from prison here, he will continue working. He is clean and sober and he has rejected his previous life of crime for one that I think is admirable and it's all borne out by the verifications done by probation.

ER 11-12. The defense attorney then concluded as follows:

> And so for that reason, I'd ask the Court to consider, if the Court can, starting from a 60-month sentence, consider granting him credit for the time that he served on his first sentence.
>
> And if the Court cannot do that, give him the minimum 60 months.

ER 12.

The court then made sentencing guideline findings on the offense level, criminal history category, and guideline range, finding them to be as recommended by the probation office. *See* ER 14-15. The court also acknowledged both the § 5K2.23 departure provision and the defense attorney's arguments. It stated:

> Pursuant to Section 5K2.23, the Court will depart downward to account for the time defendant served in state custody on the related charge. That results in a sentence only four months shorter than the one recommended by the government and would certainly result in a sentence that would achieve a reasonable punishment for the instant offense.
>
> The Court appreciates the defendant's position and the effort he's made at rehabilitation. He does have a lengthy and serious criminal history but much of it is so far in the distant past that it doesn't count toward his criminal history category and that suggests to the Court that an even lower sentence for

> the reasons that [defense counsel] explains would also be appropriate.

ER 15-16. The court then imposed a sentence of 60 months in custody. ER 17.

V.

SUMMARY OF ARGUMENT

To begin, a waiver of appeal provision in the plea agreement does not bar this appeal. The waiver is unenforceable because the government breached the plea agreement. One of the terms of the plea agreement was an agreement that the base offense level was 24. The government violated this agreement and thereby breached the plea agreement when it agreed with the presentence report's recommendation of a higher base offense level of 26.

The government did qualify this breach by recommending a variance to the base offense level of 24. That did not avoid a breach for multiple reasons. First, the government is required to strictly comply with the literal terms of a plea agreement, and the literal terms here required recommending an actual base offense level of 24, not a variance to that level. Second, characterizing a sentence recommendation as a variance below the guideline range rather than a sentence within the guideline range makes a difference in federal sentencing, because the guideline range is an initial benchmark from which the district court must start. Third, adhering to the plea agreement position that the base offense level was 24 would have prevented the government from agreeing with the presentence report's view that the drugs and gun found in the search of the house were relevant conduct. That would in turn have prevented the government from arguing for the 2-level increase based on the dangerous weapon specific offense characteristic.

As to the substantive merits of the appeal, the district court erred in not recognizing it could adjust the 5-year statutory mandatory minimum for the time Mr. Franklin served on the state sentence. This Court and others have held that mandatory minimum sentences required by statutes such as the Armed Career Criminal Act and drug statutes are satisfied by the total imprisonment in the federal case *and* any prior sentences for related conduct. This makes the mandatory minimum *federal* sentence equal to the statutory minimum less the time already served on the previous sentence. The rationale of these cases is that (1) the statutes refer to "imprisonment" or "sentence" without indicating this includes only the federal imprisonment or federal sentence; (2) construing the statutes to include the total of all imprisonment and sentences is necessary to harmonize the statutes with the sentencing guidelines and sentencing statutes governing concurrent or consecutive sentencing; and (3) there is contrasting language expressly precluding concurrent sentences in at least one other mandatory minimum statute – 18 U.S.C. § 924(c)(1).

While the prior sentences in the foregoing cases were still being served at the time the federal sentence was imposed, their reasoning extends to prior sentences which have been completed. The statutory language of "imprisonment" or "sentence" draws no distinction between sentences still being served and those already fully served; there is an alternative sentencing guideline which provides for reductions based on fully served sentences which needs to be harmonized; and there is still the contrasting language of § 924(c)(1). Cases from other circuits rejecting the extension to fully served sentences ignore the alternative guideline which still needs to be harmonized and provide no explanation for why the unlimited words, "imprisonment" and/or "sentence," should be limited to only

sentences still being served. The cases rejecting the extension also ignore several apposite principles of statutory construction, including (1) the principle that contrasting limiting language used in another provision – here, § 924(c)(1) – suggests the limitation is not intended in a provision without the limiting language; (2) the rule of lenity, which the Supreme Court itself has described as "venerable"; and (3) the canon of construction requiring that a court choosing between two plausible statutory constructions adopt the one which will not raise constitutional questions. The latter canon is triggered by a serious equal protection and due process question which would be raised if a reduction for previously served imprisonment turned on the mere happenstance of whether the prior sentence had been completed.

* * *

VI.

ARGUMENT

A. THE WAIVER OF APPEAL PROVISION IN THE PLEA AGREEMENT IS UNENFORCEABLE BECAUSE THE GOVERNMENT BREACHED THE PLEA AGREEMENT BY (1) AGREEING THAT THE HIGHER PRESENTENCE REPORT BASE OFFENSE LEVEL RECOMMENDATION WAS TECHNICALLY ACCURATE AND (2) USING THAT TO ARGUE FOR THE POSSESSION OF A DANGEROUS WEAPON SPECIFIC OFFENSE CHARACTERISTIC.

1. Reviewability and Standard of Review.

The defense did not raise a breach claim in the district court. But there is no need for an objection in the district court when a defendant raises a breach claim solely for the purpose of invalidating a waiver of appeal. As this Court explained in *United States v. Gonzalez*, 16 F.3d 985 (9th Cir. 1993):

> [Failure to raise the breach in district court] has no bearing on whether the government did in fact breach the agreement for purposes of determining whether [the defendant] may bring the appeal at all. These are two separate and distinct issues. Where the sole purpose of asserting a plea agreement breach is to avoid a waiver of the right to appeal, it would be meaningless to make such an argument below for the simple reason that district courts need not concern themselves with a defendant's appeal beyond informing him of the right. (Citation omitted.)

Id. at 989.

This Court may independently review the claim of breach, moreover. While remand for a factual determination by the district court may be necessary in some

instances, remand is not necessary when the breach is clear. *See Gonzalez*, 16 F.3d at 989-90. There is no need for district court findings here because the defense argument is based on written documents which are part of the record in the case – namely, the plea agreement and the government sentencing memorandum. This Court can analyze those documents as easily as the district court could. *Cf. United States v. Mondragon*, 228 F.3d 978, 980 (9th Cir. 2000) (reviewing breach claim de novo where "the only issue is whether the prosecutor's statements as a matter of law constituted a 'recommendation regarding sentence'").

2. A Waiver of Appeal Provision Is Unenforceable When the Government Breaches the Plea Agreement of Which the Waiver Is a Part.

Subject to some limitations because of the constitutional rights which are waived when a defendant pleads guilty, *see United States v. Barron*, 172 F.3d 1153, 1158 (9th Cir. 1999) (en banc) (noting that "the analogy is not perfect" because "[a] plea bargain is not a commercial exchange" but "is an instrument for the enforcement of the criminal law," and that "[w]hat is at stake for the defendant is his liberty"), plea agreements are generally interpreted and applied consistent with the law of contracts, *e.g., United States v. De la Fuente*, 8 F.3d 1333, 1337-38 (9th Cir. 1993). And it is almost hornbook law that a party cannot claim the benefits of a contract which it has breached. An example of this principle's application to plea agreements is the preclusion of government reliance on appeal waiver provisions in plea agreements which the government has itself breached. A waiver of appeal provision in a plea agreement is unenforceable if the

government has breached the plea agreement of which the waiver is a part. *United States v. Gonzalez*, 16 F.3d at 989.

3. The Government Breached the Plea Agreement Here When it Agreed the Presentence Report Offense Level Calculations Were Technically Accurate and Used That to Also Argue for the Possession of a Dangerous Weapon Specific Offense Characteristic.

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). "[T]he government is held to the literal terms of the agreement," *United States v. Camarillo-Tello*, 236 F.3d 1024, 1026 (9th Cir. 2001); *United States v. Mondragon*, 228 F.3d at 980, and plea agreements must be strictly construed in favor of the defendant, *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir. 1992), *amended*, 990 F.2d 1163 (9th Cir. 1993). Further, "*Santobello* prohibits not only 'explicit repudiation of the government's assurances, but must in the interests of fairness be read to forbid end-runs around them.'" *United States v. Canada*, 960 F.2d 263, 269 (1st Cir. 1992) (quoting *United States v. Voccola*, 600 F. Supp. 1534, 1537 (D.R.I. 1985)). The government must "strictly comply" with its obligations. *Mondragon*, 228 F.3d at 981.

The government did not strictly comply with the literal terms of the plea agreement here. Those literal terms included (1) a promise by the government to "[a]bide by all agreements regarding sentencing contained in this agreement," ER 46, and (2) an agreement that the base offense level was 24 under § 2D1.1(c)(8) of

the sentencing guidelines, ER 52. The government did not abide by the agreement about the base offense level. When the presentence report recommended the higher base offense level of 26, *see* PSR, ¶¶ 20-21, the government agreed it was that higher base offense level which was accurate, not the base offense level of 24 agreed to in the plea agreement, *see* ER 35.

It is true the government qualified its agreement with the presentence report base offense level recommendation by describing it as "technically"accurate and then suggested a variance to offset the difference. This did not satisfy the plea agreement for two reasons, however. First, "strict compl[iance]" with the "literal terms" of the plea agreement is what is required, *e.g., United States v. Camarillo-Tello*, 236 F.3d at 1027 (finding breach in part because government sentencing memorandum simply failed to state reasons underlying its recommendation and plea agreement required the government to state its reasons), and the literal term here was an agreement to a lower base offense level, not a variance. Second, characterizing a sentence recommendation as a variance below a guideline range rather than a sentence within the guideline range does make a difference in federal sentencing. While imposing a sentence below the guideline range is far easier after the Supreme Court's holding in *Booker v. United States*, 543 U.S. 220 (2005), the guideline range remains the "starting point and . . . initial benchmark." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). Probably because of this, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Molina-Martinez*, 136 S. Ct. at 1346 (quoting *Peugh v. United States*, 133 S. Ct.

2072, 2084 (2013)).[6]

The different characterization of the government's recommendation as a variance instead of the agreed-upon base offense level was damaging in another way, moreover. It was that characterization that allowed the government to make another argument which increased the guideline range, namely, that there should be 2 levels added under § 2D1.1(b)(1) for Mr. Franklin's possession of a gun, *see supra* pp. 5, 6, when his house was searched. A government concession that the base offense level was only 24 would have been an implicit concession that the drugs found in the house a week after the charged distribution should not be treated as relevant conduct, since base offense levels are determined by not just the offense of conviction but relevant conduct under § 1B1.3(a).[7] That would have

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[6] Though a showing of prejudice is not necessary where Mr. Franklin is not seeking a remedy for the breach, it is certainly possible the district court might have imposed a different sentence if its starting point had been a lower range. The total offense level produced by using a base offense level of 24 with the 3-level reduction for acceptance of responsibility would have been 21 without the enhancement for the gun and 23 with the gun enhancement, which produces guideline ranges of 57-71 months and 70-87 months when combined with Mr. Franklin's criminal history category of IV, *see* U.S.S.G. Ch. 5, Pt. A. Especially if it had been faced with the lower of these two ranges, the court might have imposed a lower sentence than 60 months – subject to a recognition of its authority to do so, which is discussed in section B below. The court recognized specific mitigating factors that included "the defendant's position and the efforts he's made at rehabilitation" and the age of much of his criminal history, and stated more generally that "an even lower sentence for the reasons that [defense counsel] explains would also be appropriate." ER 16.

[7] As noted *supra* p. 5 n.2, the relevant conduct guideline controls the computation of most guideline offense level components – including the base offense level, specific offense characteristics, and Chapter Three adjustments in the guidelines. *See* U.S.S.G. § 1B1.3(a). As also noted *supra* p. 5 n.2, the "relevant conduct" which must be considered includes, in the case of drug

meant the gun found at the same time as the additional drugs could not be treated as relevant conduct. That in turn would have prevented the government from arguing for application of the dangerous weapon specific offense characteristic in § 2D1.1(b)(1), since specific offense characteristics are determined based on just the offense of conviction and relevant conduct, *see supra* p. 5 nn.2, 4 (discussing U.S.S.G. § 1B1.3(a)); *supra* n.7 (same).

That the government may have had second thoughts and concluded the better view was that the drugs found in the house a week later should be treated as relevant conduct does not mean the government was entitled to back out of its agreement. Whether the possession of drugs on another occasion is relevant conduct depends on whether they are "part of the same course of conduct or common scheme or plan as the offense of conviction," U.S.S.G. § 1B1.3(a)(2), which is a very fact-specific question, *see* U.S.S.G. § 1B1.3, comment. (n.5(B)) (listing factors to be considered in deciding whether other conduct is part of "common scheme or plan" or "same course of conduct"). While it might not have been the strongest argument, the government could have justified the agreed upon base offense level by arguing possession of different drugs a week later was not part of the same course of conduct or common scheme or plan as the earlier single sale to the informant. This Court has held prosecutors bound by promises in plea agreements even when they were completely unable to fulfill the promises. *See*

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offenses such as the one Mr. Franklin was convicted of, other acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). *See also* PSR, ¶ 20. It was the presentence report's treatment of the additional drugs found in the house as part of the same course of conduct or common scheme or plan as the earlier sale to the informant that increased the base offense level, as noted *supra* p. 5 & n.3.

Brown v. Poole, 337 F.3d 1155, 1161 (9th Cir. 2003); *United States v. Anderson*, 970 F.2d at 606. A prosecutor must be equally bound when she is simply required to make a debatable sentencing argument that is inconsistent with the presentence report.

B. THE DISTRICT COURT ERRED IN NOT RECOGNIZING IT COULD ADJUST THE 5-YEAR STATUTORY MANDATORY MINIMUM SENTENCE REQUIRED BY 21 U.S.C. § 841(b)(1)(B) FOR THE TIME MR. FRANKLIN SERVED ON THE STATE SENTENCE.

1. Reviewability and Standard of Review.

Defense counsel made two alternative requests at the sentencing hearing. As his first request, he asked the Court to "*starting from* a 60-month sentence, consider granting [Mr. Franklin] credit for the time that he served on his first sentence." ER 12 (emphasis added). In the alternative, counsel asked, "if the Court cannot do that, give him the minimum 60 months." ER 12.

The court did not expressly rule on whether it had the authority to "start[ ] from" and adjust the 60-month mandatory minimum for the time served in state custody. The record strongly suggests the court did not believe it had that authority, however. It went lower than the government's 70-month recommendation, went lower than the presentence report's 66-month recommendation, and recognized that "an even lower sentence" was appropriate "for the reasons that [defense counsel] explains." ER 16. This strongly suggests the court believed it was going as low as it could go and warrants remand for

reconsideration if that belief was incorrect.[8]

The underlying legal question – whether the statutory mandatory minimum may be adjusted by time served in state custody for related conduct – is a question of statutory interpretation. Questions of statutory interpretation are subject to de novo review. *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 554 (9th Cir. 2016).

2. The Mandatory Minimum Sentence Required by 21 U.S.C. § 841(b)(1)(B) Is a Total Sentence Which Is Adjusted by Time Spent in State Custody for Related Conduct.

The first court to address the question of whether a mandatory minimum sentence required by statute is a total sentence which includes time served on a state sentence for related conduct was *United States v. Kiefer*, 20 F.3d 874 (8th Cir. 1994). The defendant in *Kiefer* was sentenced in federal court for felon in possession of a firearm while serving a state sentence for a robbery he had committed with the same gun. *See id.* at 875. The defendant had already served

[8] Even the Supreme Court has suggested a more lenient remand standard when a remand is simply for resentencing. As the Court recently recognized in rejecting an excessively demanding plain error standard, "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348-49 (2016) (quoting *United States v. Wernick*, 691 F.3d 108, 117-18 (2d Cir. 2012)). *See also United States v. Thomas*, 447 F.3d 1191, 1201 (9th Cir. 2006) (remanding for resentencing after *United States v. Booker*, 543 U.S. 220 (2005), because district court's selection of minimum sentence prevented court of appeals from concluding with certainty that defendant would have received identical sentence had district court known guidelines were advisory).

some time in state custody, so simply making the federal sentence concurrent accounted for only some of the state sentence. *See id.* The court held the 15-year statutory mandatory minimum at issue there – provided for in the Armed Career Criminal Act, codified at 18 U.S.C. § 924(e) – included the time already served on the state sentence, so the mandatory minimum *federal* sentence was the statutorily required total of 15 years less the time served in state custody. *See id.* at 877.

The *Kiefer* court based its holding on three rationales. First, it considered the meaning of the plain language of 18 U.S.C. § 924(e)(1) – that a person who violates the felon in possession of a firearm statute and has three prior violent felony convictions "shall be . . . imprisoned not less than 15 years," *Kiefer*, 20 F.3d at 876 (quoting 18 U.S.C. § 924(e)(1)). The court noted "[t]he issue . . . turns on the meaning of the word 'imprisoned': when the Guidelines mandate that state and federal sentences be served concurrently, is a defendant 'imprisoned' for purposes of the mandatory minimum federal sentence during the time he serves on the concurrent state sentence prior to his federal conviction?" *Kiefer*, 20 F.3d at 876. The court then offered the following analysis of this issue:

> It can . . . be argued that the time [the defendant] served in state prison for these different offenses may not be considered time he was "imprisoned" for purposes of § 924(e)(1). But that restrictive construction would frustrate the concurrent sentencing principles mandated by other statutes. Unlike a § 924(c)(1) mandatory minimum sentence, which may not be made concurrent with the sentence for any other offense, § 924(e)(1) does not forbid concurrent sentencing for separate offenses that were part of the same course of conduct. (Footnote omitted.) In the circumstances, although the issue is not free from doubt, we conclude that time previously served under concurrent sentences may be considered time "imprisoned" under § 924(e)(1) if the Guidelines so provide.

Kiefer, 20 F.3d at 877.

Second, the *Kiefer* court looked to the guideline provision governing the

interaction of newly imposed sentences with existing sentences – § 5G1.3. In addition to providing that the newly imposed sentence should run concurrently with any existing sentence for relevant conduct, § 5G1.3 provides for adjustment of the guideline range for time already served on such a sentence. As worded at the time *Kiefer* was decided, § 5G1.3 required, in its commentary, that the sentencing court "adjust [the guideline range] for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense." *Kiefer*, 20 F.3d at 875 (quoting U.S.S.G. § 5G1.3, comment. (n.2) (1993)).[9] The *Kiefer* court reasoned that the mandatory minimum statute and this guideline "would be properly harmonized, if § 924(e)(1) were construed to permit the sentencing court to give [the defendant] a sentence credit in the form of a reduced federal sentence under § 5G1.3(b)." *Kiefer*, 20 F.3d at 876. This is consistent with the principle of construction that the words of a statute should be read "with a view to their place in the overall regulatory scheme, and to '"fit, if possible, all parts into an harmonious whole."'" *United States v. Millis*, 621 F.3d 914, 917 (9th Cir. 2010) (quoting *FDA v. Brown &*

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[9] In the present version of § 5G1.3, comparable language is included in subsection (b)(1) of the guideline itself. It reads as follows:

> If . . . a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
>
> (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; . . .

U.S.S.G. § 5G1.3(b).

Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), and *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)).

Third, the *Kiefer* court looked to another provision which it reasoned "would be properly harmonized" by reading the statutory mandatory minimum statute to include time already served in state custody. That other provision was 18 U.S.C. § 3584, which vests the sentencing court with authority to determine whether sentences should run concurrently or consecutively. *See Kiefer*, 20 F.3d at 876. Section 3584 intertwines with § 5G1.3(b) because it requires that "the court 'shall consider,' among other factors, 'the kinds of sentence . . . set forth in the guidelines.'" *Kiefer*, 20 F.3d at 876 (quoting 18 U.S.C. § 3553(a) and 18 U.S.C. § 3584(b)).

This Court approved and adopted the *Kiefer* holding and its rationales in *United States v. Drake*, 49 F.3d 1438 (9th Cir. 1995), which was also an Armed Career Criminal Act case. The Court first approvingly quoted *Kiefer*'s general holding that "in appropriate circumstances time served in custody prior to the commencement of the mandatory minimum sentence is time 'imprisoned' for purposes of § 924(e)(1)." *Drake*, 49 F.3d at 1440 (quoting *Kiefer*, 20 F.3d at 876). The court then fully approved and adopted *Kiefer*'s reasoning:

> As the *Kiefer* court recognized, section 924(e)(1) was enacted after the Sentencing Reform Act, 18 U.S.C. § 3551 et seq. Under the terms of the Act, the district court must exercise its discretion to determine whether the sentence ultimately imposed should be concurrent or consecutive to an undischarged term of imprisonment. *See* 18 U.S.C. § 3584. In determining whether to impose a concurrent or consecutive term, 18 U.S.C. § 3584(b) directs the sentencing court to consider, among other factors, "the kinds of sentence . . . set forth in the guidelines." 18 U.S.C. § 3553(a)(4). Thus, to implement section 924(e)(1) properly, sentencing courts must incorporate the Sentencing Guidelines into the ultimate sentence imposed. (Footnote omitted.) Without a doubt, "[s]ection 5G1.3 is part of that sentencing regime." *Kiefer*, 20

> F.3d at 876.
>
> In order to harmonize the statutory mandatory minimum with the remainder of the sentencing scheme, we construe 18 U.S.C. § 924(e)(1) to require the court to credit [the defendant] with time served in state prison. To hold otherwise would "frustrate the concurrent sentencing principles mandated by other statutes." *Id.* at 877.

Drake, 49 F.3d at 1440-41.

The mandatory minimum statute interpreted in *Kiefer* and *Drake* was the Armed Career Criminal Act, while the statute at issue in Mr. Franklin's case is the drug distribution mandatory minimum statute in 21 U.S.C. § 841(b)(1)(B). The *Kiefer*/*Drake* reasoning directly extends, however, as recognized in *United States v. Rivers*, 329 F.3d 119 (2d Cir. 2003). *Rivers* acknowledged but rejected a government argument that *Kiefer*, *Drake*, and other cases following *Kiefer* depend on the particular wording of the Armed Career Criminal Act.

> The government attempts to distinguish the above-cited circuit cases, in that the statute at issue in those cases is different from the statute involved here. Those cases involve statutory minimum sentences pursuant to the Armed Career Criminal Act . . . , 18 U.S.C. § 924(e)(1), which states that the offender "shall be . . . *imprisoned* not less than fifteen years . . . ." *Id.* (emphasis added). In contrast, the statute here requires that the offender "be *sentenced* to a term of imprisonment which may not be less than 5 years." 21 U.S.C. § 841(b)(1)(B) (emphasis added).
>
> This linguistic variance is a distinction without a difference.

Rivers, 329 F.3d at 122.

Rivers then quoted and expanded upon a point made in *Drake*:

> "[W]hen Congress intended that the statutory mandatory minimums not be affected by the requirements of concurrent sentencing, it made its intent quite clear." *Drake*, 49 F.3d at 1441 n.5 (citing 18 U.S.C. § 924(c)(1)). The adjustments under U.S.S.G. § 5G1.3(b) are "derivative" of the concurrent sentencing scheme. (Citation omitted.) A rule that, without any underlying rationale or congressional direction, would disallow adjustments for some statutes while allowing them for others, "would frustrate the concurrent sentencing principles

mandated by other statutes." *Kiefer*, 20 F.3d at 877.

Rivers, 329 F.3d at 122-23. The contrasting statute cited – 18 U.S.C. § 924(c)(1) – expressly prohibits concurrent sentences, by stating that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. § 924(c)(1)(D)(ii).

The only difference between the present case and *Kiefer*, *Drake*, and *Rivers* is that Mr. Franklin had completed his sentence while the defendants in the other cases were still serving theirs. This does eliminate one of the rationales relied upon in the other cases, because 18 U.S.C. § 3584 applies only to "a defendant who is already subject to an *undischarged* term of imprisonment." 18 U.S.C. § 3584(a) (emphasis added). The other two rationales remain equally strong, however.

Initially, there remain applicable guideline provisions to harmonize. While § 5G1.3(b) does not apply directly, it applies indirectly through its incorporation into § 5K2.23. Section 5K2.23 expressly suggests the possibility of a downward departure "if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense."

Secondly, *Kiefer*'s reasoning based on the statutory language is equally persuasive whether or not the other sentence has been completely served. The statutes simply require the defendant to be "imprisoned," in the case of the Armed Career Criminal Act, or "sentenced," in the case of 21 U.S.C. § 841(b)(1)(B), to not less than the time specified. This contrasts with 18 U.S.C. § 924(c)(1), which

expressly states, as quoted above, that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. § 924(c)(1)(D)(ii).

There are also several additional principles of statutory construction which are pertinent. A principle triggered by the express contrasting language in § 924(c)(1) is the principle that the use of limiting language in one statutory provision and the failure to use the limiting language in a second statutory provision suggests an intent that the limitation not apply to the second provision. *See, e.g., United States v. Johnson*, 529 U.S. 53, 57-58 (2000); *United States v. Wipf*, 620 F.3d 1168, 1171 (9th Cir. 2010); *United States v. Youssef*, 547 F.3d 1090, 1094-95 (9th Cir. 2008). There is also the "venerable rule of lenity," *United States v. R.J.C.*, 503 U.S. 291, 305 (1992), which requires that "ambiguities concerning the ambit of criminal statutes should be resolved in favor of lenity to the defendant," *United States v. Wing*, 682 F.3d 861, 874 (9th Cir. 2012). This principle, as eloquently put by Judge Friendly and the Supreme Court, is "rooted in '"the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."'" *R.J.C.*, 503 U.S. at 305 (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971), and H. Friendly, *Benchmarks* 209 (1967)).

Finally, there is the "canon of constitutional avoidance," which requires a court choosing between two plausible statutory constructions to adopt the one which would not raise constitutional questions, *Clark v. Suarez Martinez*, 543 U.S. 371, 380-81 (2005). Construing the Armed Career Criminal Act or 21 U.S.C. § 841(b)(1)(B) to allow adjustment for time served on a previously imposed sentence only when the defendant is still serving the sentence would raise a serious equal protection and due process question. Indeed, one court has actually

found a constitutional violation. It reasoned:

> No rational basis for this distinction exists. . . . [*United States v.*] *Blackwell*[, 49 F.3d 1232 (7th Cir. 1995),] observed two decades ago that "distinguishing between two defendants merely by virtue of their sentencing dates appears contrary to the Guidelines goal of eliminating unwanted sentencing disparities," 49 F.3d at 1242, and [*United States v.*] *Cruz*[, 595 F.3d 744 (7th Cir. 2010)] observed more recently that "[t]he adjustment . . . for the portion of the state sentence that the defendant had already served was necessary to avoid a situation in which the happenstance of how much of the prior sentence has been served when the federal sentence is imposed would determine the length of the defendant's imprisonment," 595 F.3d at 746. For a defendant in Hill's situation, § 3584 creates a situation where mere happenstance determines whether the court has the discretion to impose a federal sentence below the statutory minimum to account for his time in state custody. That "arbitrary distinction" lacks plausible justification and therefore violates due process. (Citation omitted.)

United States v. Hill, — F. Supp. 3d — , No. 11 CR 667-4, 2016 WL 2937023, at *6 (N.D. Ill. May 20, 2016).

Three other circuits have rejected the extension of *Kiefer*'s reasoning to sentences which have already been fully served, *see United States v. Lucas*, 745 F.3d 626 (2d Cir.), *cert. denied*, 135 S. Ct. 150 (2014); *United States v. Cruz*, 595 F.3d 744 (7th Cir. 2010); *United States v. Ramirez*, 252 F.3d 516 (1st Cir. 2001),[10] but those cases are poorly reasoned and hence unpersuasive. Initially, they rely on the fact that 18 U.S.C. § 3584 and § 5G1.3(b) are inapplicable to a discharged term of imprisonment and discount one of the rationales of *Kiefer* based on that. *See Lucas*, 745 F.3d at 629-30; *Cruz*, 595 F.3d at 746; *Ramirez*, 252 F.3d at 519. This ignores § 5K2.23, which directly incorporates § 5G1.3. While 18 U.S.C. § 3584 does not have to be harmonized when a previously imposed sentence is fully

[10] The First Circuit in *Ramirez* left open whether it would follow *Kiefer* even where the prior sentence is not fully served, *see Ramirez*, 252 F.3d at 519, so *Ramirez* could represent a rejection of *Kiefer* itself.

served, § 5K2.23 does.

These other cases also rely on reasoning that a court cannot depart below a statutory mandatory minimum absent some other specific statutory authority, such as 18 U.S.C. § 3553(e) or 18 U.S.C. § 3553(f). *See Lucas*, 745 F.3d at 629-30; *Cruz*, 595 F.3d at 746. This begs the question of what the statutory mandatory minimum is made up of, however. *Kiefer*, *Drake*, and *Rivers* held the statutory mandatory minimum is made up of the newly imposed federal sentence *and* any time already served on a sentence for related conduct. That could include time served on an already completed sentence just as easily as it includes time served on a sentence still being served.

Finally, the cases rejecting the extension of *Kiefer*'s reasoning offer no explanation for not extending the broader reading of the "imprisoned" and "sentenced" language in the statutes. While those words could be read to refer to just the federal sentence, that reading was rejected in *Kiefer*, *Drake*, and *Rivers*. Reading the words to include some previously served custody time and not other previously served custody time is reading a distinction into the statutes that is simply not there. And there is no principle of construction requiring such a reading.

In sum, *Kiefer*, *Drake*, and *Rivers* extend to fully served sentences for related conduct. First, two of the three rationales for the holding in *Kiefer*, *Drake*, and *Rivers* extend. Second, the other principles of statutory construction discussed *supra* p. 25 weigh in favor of such an extension. Third, drawing a distinction between time served on a sentence still being served and time served on a completed sentence requires reading something into the statutes that is simply not there.

VII.

CONCLUSION

The case should be remanded to the district court with instructions that the mandatory minimum sentence to which Mr. Franklin is subject is 5 years of *total* custody, including the time served in state custody for related conduct, so the mandatory minimum *federal* sentence the court must impose is 5 years *less the time Mr. Franklin served on his state sentence*. The district court should reconsider its sentence with that understanding.

Respectfully submitted,

DATED: August 5, 2016

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF RELATED CASES

Counsel for appellant certifies that he is unaware of any pending case presenting an issue related to those raised in this brief.

DATED: August 5, 2016

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 7,947 words.

DATED: August 5, 2016

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

STATUTORY APPENDIX

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21 U.S.C. § 841(b)(1)(B)

. . .

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) . . .

(2)(B) In the case of a violation of subsection (a) of this section involving–

. . .

(iii) 28 grams or more of a mixture or substance described in clause (ii) [including cocaine] which contains cocaine base;

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

. . .

§ 5G1.3. **Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment**

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

. . .

§ 5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Certificate of Service

I hereby certify that on August 5, 2016, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Carlton F. Gunn
By: CARLTON F. GUNN