

# 12-1072

*To Be Argued By:*  
MICHAEL E. RUNOWICZ

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 12-1072**

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

CHRISTOPHER GOINS, aka Mad Ball,  
*Defendant,*

TERRENCE STEELE, aka Tee-Fur,  
aka T, aka T-Fur,  
*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Statement of Jurisdiction

The United States District Court for the District of Connecticut (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment on April 18, 2007. Appendix (“A\_\_”) 14. After the sentence was vacated and remanded, *see United States v. Steele*, 283 Fed. Appx. 838 (2d Cir. 2008), the district court entered an amended judgment on August 3, 2009, A17, A119.

On December 20, 2011, the defendant filed a motion under 18 U.S.C. § 3582(c)(2) seeking a modification of his sentence. A17, A33. On January 19, 2012, the district court granted that motion in part, reducing the defendant’s sentence to 140 months’ imprisonment. A18, A70. That ruling entered on the docket January 20, 2012. A18. On January 24, 2012, the defendant filed a letter raising a new argument in support of his motion for a sentence reduction, A18, and on March 12, 2012, the defendant filed a notice of appeal, A18.<sup>1</sup> On August 8, 2012, the defendant filed a

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<sup>1</sup> Although the defendant’s March 12, 2012 notice of appeal was not timely, the defendant had filed a letter that the court subsequently construed as a motion to reconsider within the timeframe for the filing of a motion to reconsider. A113. In any event, the issue raised by this case is properly before this Court

formal motion to reconsider the district court's decision. A20, A71. On August 13, 2012, this Court granted a limited remand under Federal Rule of Appellate Procedure 12.1 to allow the district court to rule on the motion to reconsider. *See* A112.

In a written ruling entered on September 14, 2012, the district court granted the defendant's motion to reconsider, but upon reconsideration concluded that the defendant was not entitled to a further sentence reduction. A20, A113. The defendant filed a timely notice of appeal from this decision pursuant to Fed. R. App. P. 4(b) on September 27, 2012. A20, A122. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

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because the defendant filed a timely notice of appeal to challenge the district court's ruling on his motion to reconsider.

**Statement of Issue  
Presented for Review**

Whether the district court properly limited the defendant's sentence reduction under 18 U.S.C. § 3582(c)(2) to 140 months' imprisonment, a sentence at the bottom of the amended guidelines range, where the record demonstrates that that range was calculated using, as required by U.S.S.G. § 1B1.10, the *pre*-departure guidelines range.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 12-1072

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

TERRENCE STEELE, aka Tee-Fur, aka T,  
aka T-Fur,  
*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

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### **BRIEF FOR THE UNITED STATES OF AMERICA**

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#### **Preliminary Statement**

In 2009, the district court sentenced the defendant, Terrence Steele, to 151 months' imprisonment for his role in a crack cocaine distribution conspiracy. This sentence was based, in part, on the court's conclusion that Steele's pre-departure guidelines range was calculated using a total offense level of 30 and a criminal history category VI. Two years later, after the Sentencing Commission reduced the guidelines ranges

for crack cocaine offenses, Steele moved for a reduced sentence based on those new ranges. The district court granted Steele's request in part by reducing his sentence to 140 months' imprisonment, the bottom of the amended guidelines range.

Steele appeals, arguing that his amended guidelines range should have been calculated with criminal history category V, and thus that his sentence could have been reduced to a sentence as low as 130 months. This argument rests on a mis-reading of the record, however. Although Steele was sentenced using criminal history category V, that range was a *post*-departure range, a conclusion reiterated by the district court in its ruling on Steele's motion to reconsider. Because the Sentencing Commission has made clear that the relevant range for determining eligibility for sentence reductions under § 3582(c)(2) is the *pre*-departure guidelines range, the district court properly concluded that Steele's sentence reduction was limited to 140 months' imprisonment.

### **Statement of the Case**

Following a jury trial, Terrence Steele was found guilty of one count of conspiring to possess with the intent to distribute fifty grams or more of cocaine base and one count of possession with the intent to distribute fifty grams or more of cocaine base. A12. On April 5, 2007, United States

District Judge Ellen Bree Burns sentenced Steele principally to 324 months of imprisonment. A13-14. On appeal, this Court affirmed Steele's conviction, but remanded the case to the district court for reconsideration of his sentence pursuant to procedures set forth in *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008). *United States v. Steele*, 283 Fed. Appx. 838 (2d Cir. 2008). On remand, the district court sentenced Steele to serve a term of 151 months' imprisonment, A17, A119; this Court affirmed that judgment, see *United States v. Steele*, 402 Fed. Appx. 660 (2d Cir. 2010).

On December 20, 2011, Steele filed a motion seeking application of the amended sentencing guidelines to his case. A17, A33. On January 19, 2012, the district court granted Steele's motion and reduced Steele's sentence to 140 months' imprisonment. On January 24, 2012, Steele filed a letter raising a new argument in support of his motion for a sentence reduction, A18, and on March 12, 2012, he filed a notice of appeal, A18. On August 8, 2012, Steele filed a motion to reconsider the district court's decision, A20, A71, and on August 13, 2012, this Court granted a limited remand under Federal Rule of Appellate Procedure 12.1 to allow the district court to rule on the motion to reconsider, A112.

In a written ruling entered on September 14, 2012, the district court granted Steele's motion to reconsider, but determined that it had correct-

ly calculated the amended sentencing guidelines range and had not committed any error in reducing the defendant's sentence to 140 months. A20, A113. Steele filed a timely notice of appeal from this decision on September 27, 2012. A20, A122.

Steele is currently serving the sentence imposed by the district court.

## **Statement of Facts and Proceedings Relevant to this Appeal**

### **A. Initial sentencing and first appeal**

Terrence Steele was convicted following a jury trial of conspiracy to possess and possession with the intent to distribute, of fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). In the Pre-Sentence Report prepared for sentencing, the Probation Office concluded that Steele was a career offender under U.S.S.G. § 4B1.1, and thus that his adjusted offense level was 37. Government Sealed Appendix 10 (“GSA\_\_”)² (¶ 20). The Probation Office further found that Steele was in criminal history category VI, both because he had 20 criminal history points and because he was a career offender. GSA13 (¶ 35). This resulted in a guidelines range of 360 months to life. GSA17 (¶ 57); A32.

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<sup>2</sup> The Probation Office prepared an Addendum to the PSR to assist the district court in its ruling on Steele’s § 3582(c)(2) motion. This addendum, which included the original PSR and the Statements of Reasons from Steele’s two sentencing hearings, is included in its entirety in the Government’s Sealed Appendix. The final document in the sealed appendix is the one-page explanation for the district court’s ruling on Steele’s § 3582(c)(2) motion, a document that was sealed by the district court.

In a sentencing memorandum filed before sentencing, Steele acknowledged that he was in criminal history category VI, but argued that that designation overstated the seriousness of his criminal history. Government Appendix 3-5 (“GA\_”). Accordingly, he asked the court to depart downward one criminal history category as permitted by the guidelines. GA3-5.

At the sentencing hearing conducted on April 5, 2007, the district court adopted the guideline calculation from the PSR, *see* GSA23 (Statement of Reasons), but granted Steele’s requested departure:

THE COURT: I think that probably the guideline range of 360 months to life is too much. So how much less should it be? I think going down to a criminal history category of five would be appropriate. That’s as far as I think I’m prepared to go—I’m sorry—which would be a guideline range of 324 to 405.

GA78-79. With the final range calculated, the district court sentenced Steele to imprisonment for 324 months, to be followed by ten years of supervised release. A32.

Steele appealed his conviction and sentence. This Court affirmed his conviction and rejected most of Steele’s arguments about his sentence. *Steele*, 283 Fed. Appx. at 839-40. The Court remanded pursuant to *Regalado*, however, to allow

the district court to determine whether the crack-powder disparity might result in a different sentence. *Id.* at 840-41. In particular, the Court noted that “the district court [had] exercised its discretion in granting a one-level Criminal History departure,” but that the district court’s comments on the crack-powder disparity were ambiguous as to whether the court understood it could depart on those grounds. *Id.*

## **B. Remand and second appeal**

In preparation for proceedings on remand, the government moved to withdraw its previously filed notice of a prior conviction under 21 U.S.C. § 851. A16. As the government explained, in light of recent developments in the law, it could no longer establish the basis for an enhanced penalty in this case. A16, A77-78. These same developments further resulted in a conclusion that Steele no longer qualified as a career offender. *See* GSA21. As a result of these changes in the law (as well as the 2007 reduction in the guidelines for crack cocaine offenses), Steele had an adjusted base offense level of 30 and faced a mandatory minimum term of 120 months’ imprisonment. GSA21 (Second Addendum to the PSR); A80.

During this sentencing proceeding, Steele requested, and was granted, the same reduction in his criminal history category that the court had granted in the first sentencing:

MR. UNGER: And if the Court were, again, and I think it would be the judicious thing for the Court to do, to reduce the criminal history category from a VI to a V—

THE COURT: Yes, I'm going to do that, although I would like to point out that there is another conviction that should now be noted, on his record . . . .

A80-81.

A few minutes later, the court confirmed that these calculations resulted in a final guidelines range of 151-188 months' imprisonment:

MR. UNGER: In any event, the calculations that I have tried to do indicate to me that at a Level 30, under the advisory guidelines, my client's—I believe his guidelines range would be between 168 months and 210 months.

THE COURT: I'm not certain that's correct, sir. I have 151 to 188.

MR. UNGER: Right. Okay. I might have used the wrong—

THE COURT: You may have used the—

MR. UNGER: VI.

THE COURT: —the Criminal Category VI.

MR. UNGER: The VI.

THE COURT: Yes. Well, I'm prepared to—  
Notwithstanding the additional conviction,—

MR. UNGER: Okay. Thank you.

THE COURT: —I'm prepared to go down one level.

A81-82. Counsel for the government agreed with this calculation:

MR. KANG: If Your Honor were, as the Court did at the initial sentencing, to move over one category horizontally, to a criminal history category of V, at a level 30, Mr. Steele's applicable guideline range would be 151 to 188 months . . .

A86.

The government continued by addressing the § 3553(a) factors, noting, for example, that Steele's criminal history "runs broad and deep . . . ." A88. According to the government, this was a factor that ought to bear on the district court's decision regarding his sentence:

MR. KANG: [L]ooking at his criminal record by itself, he is essentially a natural criminal history category of VI, meaning that he's got sufficient criminal history points, 20 criminal history points, which would warrant the highest criminal history category.

A89.

Despite Steele's extensive criminal history, the district court decided that it would adhere to its original decision (from the first sentencing) to depart downward from category VI to category V:

THE COURT: . . . I guess we're all in agreement on what the guideline range is, assuming, and I think it was a correct assumption, that I would not make Mr. Steel[e] respond to a Criminal History Category VI, having once decided to reduce it to V. So it's 151 to 188 months.

And by the way, that decision with respect to his criminal history at the time, did not take into consideration his most recent conviction, Assault I. . . .

Nonetheless, I will adhere to my original judgment and place him in a Criminal History Category V, . . . adjusted offense level of 30, and a Criminal History Category V, we're all in agreement, renders a guideline range of 151 to 188 months.

A95.<sup>3</sup> After further consideration of the relevant factors impacting Steele's sentence, the district

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<sup>3</sup> The Statement of Reasons for this sentencing states that the pre-departure range was 151-188 months, using a criminal history category V. GSA27. As explained by the district court, however, this was erroneous because the pre-departure range was cal-

court sentenced him to 151 months of imprisonment, the bottom of the guidelines range. A17, A97, A119.

Steele appealed, and this Court affirmed the judgment. *Steele*, 402 Fed. Appx. at 660.

**C. Motion for sentence reduction under 18 U.S.C. § 3582, and motion for reconsideration**

In December of 2011, Steele submitted a letter to the district court seeking retroactive application of the amended sentencing guidelines for crack cocaine offenses under 18 U.S.C. § 3582. A17, A33. The Probation Office prepared an addendum to assist the court in ruling on this motion. In the addendum, the Probation Office concluded that Steele was eligible for a sentence reduction to a sentence within the new range of 140-175 months, a range it calculated by reducing Steele's pre-departure range to account for the new crack cocaine offense levels. GSA1-2.

On January 19, 2012, the district court entered an order reducing Steele's sentence from 151 months to 140 months' imprisonment. A18, A70; *see also* GSA31.

Steele moved to reconsider this decision, arguing that the district court had incorrectly de-

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culated using criminal history category VI. *See* A114 n.2.

terminated his amended guideline range to be 140 to 175 months based on a total offense level of 28 and a criminal history category of VI.<sup>4</sup> A71. Although Steele acknowledged that his original pre-departure range was calculated using category VI, he argued that the court should have calculated the new amended range using category V. A71. Thus, according to Steele, his amended guideline range—based on an offense level of 28 and criminal history category of V—should have been 130 to 162 months. A72.

On September 14, 2012, the district court issued its ruling on Steele’s motion for reconsideration. A20, A113. In this ruling, the court began by recounting the history of Steele’s case. The court noted that at the time of Steele’s proceedings on remand, it had “adopted the findings and conclusions of Steele’s presentence report . . . specifically that, based on the amount of crack cocaine involved in the offense of his conviction, his total offense level was 30, and based on his twenty criminal history points, his criminal history category (“CHC”) was VI.” A114. These findings “resulted in an applicable guideline sentencing range of 168 to 210 month’s imprisonment.” A114. The court noted, however, that it had

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<sup>4</sup> As described above, Steele first made this argument in a letter docketed shortly after the court entered its order reducing his sentence. A18; *see* A113 n.1.

“granted Steele a one-level criminal history departure from CHC VI to CHC V pursuant to U.S.S.G. § 4A1.3,” which resulted in a departure sentencing range of 151 to 188 months. A114. Based on this range, the court had sentenced Steele to 151 months’ imprisonment.<sup>5</sup> A17, A119.

With this background, the district court acknowledged that it had authority to reduce Steele’s sentence because his guidelines range was reduced by a retroactive amendment to the applicable guidelines range. A115-16. This authority was cabined, however, because any reduction had to be consistent with the Sentencing Commission’s policy statements. A115. Under those policy statements, the court first “had to determine the applicable guideline range that would have applied to the defendant if the amended guideline provision had been in effect at the time of his original sentence.” A116. When making this calculation under the policy statements, the court recognized that “the only applicable guideline range that matters in determining a sentence reduction is the one determined before consideration of any guideline departure provision.” A116 (citing U.S.S.G. § 1B1.10, app. Note 1(A)).

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<sup>5</sup> The court’s opinion on reconsideration states that it had sentenced Steele to 150 months, *see* A114; this appears to be a typographical error.

The court noted that Amendment 750 to the sentencing guidelines affected one component to the calculation of Steele's guideline range, that is, it lowered his offense level from level 30 to level 28, but that it had no effect on the calculation of his criminal history category. A116. Accordingly, under the provisions of U.S.S.G. § 1B1.10(b)(1), and *Dillon v. United States*, 130 S. Ct. 2683, 2694 (2010), the district court recognized that it lacked authority to impose any sentence below the range determined by the combination of Steele's amended offense level (28) with his originally determined pre-departure criminal history category of VI, namely a range of 140 to 175 months. A116-17. Thus, the district court concluded that it had not erred in imposing a sentence of 140 months which was at the bottom of the guideline range as determined by the combination of an offense level 28 and a CHC of VI. A117-118.

## Summary of Argument

The district court properly reduced Steele's sentence to 140 months after recalculating his guidelines range using the amended crack cocaine guidelines. The district court first determined that the amendment to the guidelines for crack offenses had reduced Steele's offense level to 28. The district court then followed the provisions of U.S.S.G. § 1B1.10, and combined that offense level with Steele's *pre*-departure criminal history category of VI and determined that Steele's new adjusted sentencing range was 140 to 175 months of imprisonment. The sentence of 140 months imposed by the district court was within that range and was the lowest sentence that the district court was authorized to give under the policy statements and Supreme Court precedent.

Steele argues that the court should have calculated his new range using criminal history category V, but that argument rests on a misreading of the record. The record consistently reflects that Steele's *pre*-departure criminal history category—the only criminal history category of legal relevance here—was VI.

## Argument

**I. The district court properly applied U.S.S.G. § 1B1.10 and calculated Steele’s amended guideline range using his pre-departure criminal history category.**

**A. Governing law and standard of review**

**1. Section 3582(c)(2) and the crack guidelines**

Under 18 U.S.C. § 3582(c)(2), a defendant’s sentence may be reduced when he was “sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission. . . .” Under that statute, however, a reduction is allowed only when “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *See Dillon*, 130 S. Ct. at 2691-92.

Section 1B1.10 of the Guidelines identifies the amendments which may be applied retroactively, and articulates the proper procedure for implementing such an amendment in a concluded case. Section 1B1.10 provides, in relevant part:

(a) *Authority*.—

(1) *In General*.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered

as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

\* \* \*

*(b) Determination of Reduction in Term of Imprisonment.—*

(1) *In General.*—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

*(2) Limitation and Prohibition on Extent of Reduction.—*

(A) *Limitation.*—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) *Exception for Substantial Assistance.*—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

U.S.S.G. § 1B1.10(a)-(b).

The application notes, as amended in 2011, make clear that when determining eligibility for a sentence reduction under this provision, the central question is whether the guideline amendment lowers the defendant’s applicable guideline range, defined as the range calculated *before* the consideration of any departures or

variances.<sup>6</sup> U.S.S.G. § 1B1.10, Application Note 1(A); *see also United States v. Rivera*, 662 F.3d 166, 183 (2d Cir. 2011) (describing this change to the commentary and noting that the relevant range is the pre-departure range).

In *Dillon*, the Supreme Court addressed the process for application of a retroactive guideline amendment, emphasizing that Section 1B1.10 is binding. The Court declared: “Any reduction must be consistent with applicable policy statements issued by the Sentencing Commission.” 130 S. Ct. at 2688. The Court affirmed that a two-step approach must be followed:

At step one, § 3582(c)(2) requires the court to follow the Commission’s instructions in § 1B1.10 to determine the prisoner’s eligibility for a sentence modification and the extent of the reduction authorized. Specifically, § 1B1.10(b)(1) requires the court to begin by “determin[ing] the amended guideline range that would have been applicable to the defendant” had the relevant amendment been in effect at the time of the initial sentencing. “In making such de-

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<sup>6</sup> This language was added to the application notes in 2011 to resolve a circuit split that had developed under a previous version of § 1B1.10 about whether the court should consider a defendant’s pre-departure or post-departure guideline range. *See* U.S.S.G., Appx C, Amendment 759 (Reason for Amendment).

termination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.” *Ibid.*

Consistent with the limited nature of § 3582(c)(2) proceedings, § 1B1.10(b)(2) also confines the extent of the reduction authorized. Courts generally may “not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) . . . to a term that is less than the minimum of the amended guideline range” produced by the substitution. § 1B1.10(b)(2)(A). . . .

At step two of the inquiry, § 3582(c)(2) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case.

*Id.* at 2691-92.

The amendment in question in this matter is part A of Amendment 750, which altered the offense levels in Section 2D1.1 applicable to crack cocaine offenses, and which the Sentencing Commission added to Section 1B1.10(c) as a retroactive amendment. The Sentencing Commission lowered these offense levels pursuant to the

Fair Sentencing Act of 2010, which changed the threshold quantities of crack cocaine which trigger mandatory minimum sentences under 21 U.S.C. § 841(b), and directed the Commission to implement comparable changes in the pertinent guideline.

## **2. Standard of review**

The denial of a motion pursuant to 18 U.S.C. § 3582(c)(2) is reviewed for abuse of discretion. *See United States v. Mock*, 612 F.3d 133, 135 (2d Cir. 2010) (per curiam). Within that inquiry, “[t]he determination of whether an original sentence was ‘based on a sentencing range that was subsequently lowered by the Sentencing Commission,’ 18 U.S.C. § 3582(c)(2), is a matter of statutory interpretation and is thus reviewed *de novo*.” *United States v. Martinez*, 572 F.3d 82, 84 (2d Cir. 2009) (per curiam). *See also United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam)

## B. Discussion

In reducing Steele's previously imposed sentence of 151 months of imprisonment to 140 months based on the amended sentencing guidelines, the district court properly calculated Steele's amended guidelines based on his pre-departure criminal history category of VI. Steele does not contest that the relevant guideline range is his *pre*-departure guideline range; rather, he contends that that range was calculated based on criminal history category V. That argument rests on a mis-reading of the record in this case.

The consistent record in this case demonstrates that Steele's pre-departure criminal history category was VI. At Steele's initial sentencing after his conviction, he did not contest that he was in criminal history category VI, but rather argued that his criminal history category overstated the seriousness of his criminal history. *See* GA3-5. The district court agreed with Steele, and departed downward, as permitted by the guidelines, to criminal history category V: "I think going down to a criminal history category of five would be appropriate." GA79. *See* U.S.S.G. § 4A1.3(b)(3)(A) (limiting downward departures for career offenders to one criminal history category). The clear import of the district court's statement of going down to a category V and the subsequent calculation of a guideline range of 324 to 405 demonstrates that at the

time Steele’s original sentence of 324 months was imposed, that sentence was one calculated by a departure from his otherwise calculated criminal history.<sup>7</sup>

This conclusion is confirmed by the further record of that sentencing. The judgment and Statement of Reasons identify the pre-departure range as one based on a criminal history category VI, GSA23 (Statement of Reasons), and specify that the final sentence was “a departure based on defendant’s over-represented criminal history category.” GA86 (judgment). Further, on appeal, this Court expressed its understanding that the district court had granted a one-level criminal history departure. *Steele*, 283 Fed. Appx. at 840.

The 2009 re-sentencing (to account for *Kimbrough*) reveals further evidence that Steele’s pre-departure range was calculated using criminal history category VI. After arguing that there was no reason to treat crack offenses more harshly than powder cocaine offenses, Steele’s lawyer next asked the court to “again . . . reduce [Steele’s] criminal history category from a VI to a V—” A80-81. The court quickly agreed. A81. When counsel then calculated the final guide-

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<sup>7</sup> The combination of an offense level of 37 and a CHC of V results in a guideline sentencing range of 324 to 405 months.

lines range using a level VI, the court corrected him, and explained that even though Steele had accumulated a new conviction (thus calling into question the propriety of a departure for overstatement of criminal history), the court was still “prepared to go down one level.” A81-82. Finally, at the conclusion of the hearing, the court confirmed that the final guideline range was reached by departing from a criminal history category VI to a category V, consistent with the departure it had granted at his first sentencing:

I guess we’re all in agreement on what the guideline range is, assuming, and I think it was a correct assumption, that I would not make Mr. Steel[e] respond to a Criminal History Category VI, having once decided to reduce it to V. So it’s 151 to 188 months.

And by the way, that decision with respect to his criminal history at the time, did not take into consideration his most recent conviction, Assault 1. . . .

Nonetheless, I will adhere to my original judgment and place him in a Criminal History Category V . . . .

A95. Although the Statement of Reasons that was filed with this judgment indicated that the pre-departure range was calculated using criminal history category V, the district court later explained that that notation was erroneous be-

cause the pre-departure range was calculated with a category VI. A114 n.2.

Just as with the record for the sentencing and the resentencing, the record for Steele's motion for relief under § 3582(c)(2) reflects that Steele's pre-departure range was calculated with a criminal history category VI. Steele moved for a sentence reduction under § 3582(c)(2) and the newly reduced crack cocaine guidelines, and the court granted his motion, reducing his sentence to the bottom of the new range calculated using the new crack cocaine offense levels and the pre-departure criminal history category VI: 140-175 months. A18, A70; *see also* GSA31. Steele moved to reconsider, arguing that the court should have used criminal history category V to calculate his range, but significantly, *conceded* that his pre-departure range was based on category VI. *See* A71 ("At sentencing the U.S. District Court departed from criminal history category VI to V.").

Finally, if this long record—from 2007 through the present—were in any way ambiguous, the district court's decision on Steele's motion to reconsider removed any ambiguity. In that decision, the court recounted the history of Steele's case and confirmed that his sentence resulted from a "one-level criminal history departure from CHC VI to CHC V pursuant to U.S.S.G. § 4A1.3." A114. Thus, as explained by the court, under U.S.S.G. § 1B1.10, it lacked authority to reduce Steele's sentence below the lev-

el determined by the combination of the new offense level (28) with the originally determined pre-departure criminal history category (VI), namely a range of 140 to 175 months. A116-17.

In short, the consistent record over the course of this case demonstrates that Steele's pre-departure guidelines range was determined using criminal history category VI.

Steele argues otherwise, but his arguments rest on a misreading of the record and the law. He argues, for example, that the court had "determined that [Steele's] Criminal History Category was V not VI." Def. Br. at 8. To be sure, the court's *final* determination was that Steele's range was based on criminal history category V, but as explained above, that was only *after* it had *departed* from criminal history category VI. Steele also argues that the court's reference to "going down" one level to category V could have been a reference to a variance instead of a departure, Def. Br. at 11-12, but this argument does not help Steele. The Sentencing Commission's Application Notes to U.S.S.G. § 1B1.10 make clear that the relevant range is the range calculated before the application of any departures or *variances*. U.S.S.G. § 1B1.10, Application Note 1(A). In other words, if, instead of departing to the 324-405 month range, the court had balanced all of the § 3553(a) factors and concluded that a sentence within the range of 324-405 months was the appropriate sentence, that

would not change the answer here; the important point is that in both scenarios, Steele's applicable guidelines range was the range calculated with criminal history category VI.

Finally, Steele argues that the record of the 2009 re-sentencing demonstrates that the court had placed him in criminal history category V. Def. Br. at 12-13. As described above, however, that is not the most natural reading of the proceedings. Moreover, the fact that the court did not expressly re-state that it was granting a downward departure under § 4A1.3 is not dispositive. As a preliminary matter, the court's comments as it restated its intent to sentence Steele using a criminal history category V—that it intended to apply category V *despite* learning about a new conviction that had not been counted in his criminal history—reveal that the court's decision was in fact based on a departure for “overstatement” of criminal history. A80-82, A95. In any event, the § 4A1.3 departure was not in question on remand, and the court had quickly indicated its intention to adhere to its original judgment on the question. And although the amended judgment did not identify a departure, *see* A119, that omission was in all likelihood an error, just as the Statement of Reasons filed with that judgment had erroneously identified the pre-departure range. *See* A114 n.2.

Because Steele's pre-departure sentencing range was calculated with criminal history cate-

gory VI, and there is no dispute that Steele's amended offense level was 28, the court properly concluded that it could not depart below the newly calculated range of 140 to 175 months. *See* U.S.S.G. § 1B1.10(b)(1) (court shall substitute only new amended range and leave all other guideline provisions unaffected); § 1B1.10(b)(2) (court may not reduce term of imprisonment to a term less than minimum of the amended guideline range determined under subdivision (1)); U.S.S.S. § 1B1.10, Application Note 1(A) (the relevant range is the range calculated before consideration of any departures or variances).

**Conclusion**

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 1, 2013

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Michael E. Runowicz". The signature is written in a cursive style with a large, sweeping flourish at the end.

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**Federal Rule of Appellate Procedure  
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 5,635 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, reading "Michael E. Runowicz". The signature is written in a cursive style with a large, looping initial "M".

MICHAEL E. RUNOWICZ  
ASSISTANT U.S. ATTORNEY

## **Addendum**

**§ 3582. Imposition of a sentence of imprisonment**

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**(c) Modification of an imposed term of imprisonment.**--The court may not modify a term of imprisonment once it has been imposed except that--

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**(2)** in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

**§ 1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)**

**(a) Authority.—**

**(1) *In General.***—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant’s term of imprisonment as provided by 18 U.S.C. 3582(c)(2). As required by 18 U.S.C. 3582(c)(2), any such reduction in the defendant’s term of imprisonment shall be consistent with this policy statement.

**(b) *Determination of Reduction in Term of Imprisonment.***—

**(1) *In General.***—In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments

listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

**(2) *Limitation and Prohibition on Extent of Reduction.***—

**(A) *Limitation.***—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

**(B) *Exception for Substantial Assistance.***—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

**U.S.S.G. Appendix C, Amendment  
759 (Reason for Amendment)**

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Consistent with the three-step approach adopted by Amendment 741 and reflected in § 1B1.1, the amendment . . . and amends Application Note 1 to clarify that the applicable guideline range referred to in §1B1.10 is the guideline range determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.