No. 16-9695

IN THE SUPREME COURT OF THE UNITED STATES

JODI LYNN RICHTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in vacating and remanding the district court's disposition of petitioner's motion for a sentence reduction under 18 U.S.C. 3582(c)(2) in light of intervening decisions by the court of appeals and this Court.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unreported. The order of the district court (Pet. App. 3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2017. The petition for a writ of certiorari was filed on June 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of North Dakota, petitioner was convicted of

conspiracy to possess with intent to distribute and to distribute a controlled substance (methamphetamine), in violation of 18 U.S.C. 846. She was sentenced to 216 months in prison, to be followed by five years of supervised release. Original J. 2-3. Petitioner and her attorney later filed separate motions to reduce her sentence under 18 U.S.C. 3582(c)(2). The district court granted counsel's motion and reduced petitioner's sentence to 179 months, Pet. App. 2-3, but denied petitioner's pro se motion for a greater reduction, id. at 4. The court of appeals vacated the sentence reduction and remanded the case for reconsideration in light of United States v. Koons, 850 F.3d 973 (8th Cir. 2017), petition for cert. pending, No. 17-5716 (filed Aug. 22, 2017), and Dean v. United States, 137 S. Ct. 1170 (2017). Pet. App. 1.

1. Between 2008 and 2010, petitioner bought and sold illegal drugs as part of a methamphetamine conspiracy involving more than a dozen people and activities in at least two States. Presentence Investigation Report (PSR) ¶¶ 1, 29-33. In 2010, a federal grand jury in the District of North Dakota returned an indictment charging petitioner with conspiracy to possess with intent to distribute and to distribute a controlled substance, in violation of 18 U.S.C. 846. Petitioner pleaded guilty to that offense pursuant to a written plea agreement. Plea Agreement ¶¶ 1-6; Original J. 1.

Because petitioner had two prior felony drug convictions, she was subject to a mandatory minimum sentence of life in prison under 21 U.S.C. 841(b)(1)(A). That mandatory minimum was also the sentence indicated by the federal Sentencing Guidelines, pursuant to Sentencing Guidelines § 5G1.1(b), which provides that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." The Probation Office calculated that the advisory sentencing range that would have applied under the then-applicable 2010 Sentencing Guidelines had petitioner not been subject to that statutory mandatory minimum was 121 to 151 months in prison, based on an aggregate drug quantity of more than 500 grams of methamphetamine yielding a base offense level of 32; a three-level reduction for acceptance of responsibility; and a criminal history category of IV. PSR ¶¶ 41-49, 57, 83.

The government moved for a departure from the mandatory minimum sentence, pursuant to 18 U.S.C. 3553(e), to reflect petitioner's substantial assistance. The prosecutor told the district court that petitioner had provided cooperation in this case that was "helpful" to the government, though "not terribly significant." Sentencing Tr. 6-7. The prosecutor noted that the value of petitioner's cooperation "was somewhat diminished by her conduct on pretrial release," which included several positive drug

tests and possession of drug paraphernalia. Id. at 7-8. The prosecutor ultimately recommended a sentence of 240 months. Id. at 9. Petitioner's counsel requested a sentence within the advisory guidelines range of 121 to 151 months that would have applied in the absence of the statutory mandatory minimum. Id. at 10. The district court sentenced petitioner to 216 months in prison, to be followed by five years of supervised release. Id. at 19; Original J. 2-3.

The court of appeals dismissed petitioner's subsequent appeal as barred by the appeal waiver in her plea agreement. United States v. Richter, 434 Fed. Appx. 568 (8th Cir. 2011) (per curiam).

2. a. A court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). One exception is 18 U.S.C. 3582(c)(2), which provides that a court "may reduce" the sentence of a "defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," after considering the applicable statutory sentencing factors set forth in 18 U.S.C. 3553(a), "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

b. In November 2014, the Sentencing Commission issued Amendment 782 to the Sentencing Guidelines, which reduced by two levels the base offense level corresponding to certain drug quantities. Sentencing Guidelines App. C Supp., Amend. 782 (Nov.

1, 2014). The Commission also made Amendment 782 retroactive, with the caveat that a court may "not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later." Id. Amend. 788 (Nov. 1, 2014).

c. In early 2016, counsel for petitioner moved for a reduction of her sentence under Section 3582(c)(2). D. Ct. Doc. 966 (Jan. 11, 2016). The motion stated that petitioner's "original guideline range" was "121 to 151 months, which became life pursuant to the mandatory minimum." Id. at 2. Applying the new offense levels in Amendment 782 retroactively, petitioner's guidelines range without the mandatory minimum would have been 100 to 125 months. Id. at 3.

The motion argued that the district court should disregard the mandatory minimum under the policy statement in Section 1B1.10(c) of the Guidelines. D. Ct. Doc. 966, at 3. Section 1B1.10(c) directs a court considering a sentence reduction motion to determine a defendant's "amended guideline range * * * without regard to the operation of § 5G1.1" of the Guidelines -- the section under which the mandatory minimum is (if necessary) incorporated into the guidelines range -- when a case "involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the

defendant's substantial assistance to authorities." Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014). Because petitioner's 216-month sentence was "approximately 43% above the top end of the original guideline range (setting aside the mandatory minimum)," the motion argued that the district court should reduce petitioner's sentence to 179 months, approximately 43% above the top end of the amended guidelines range. D. Ct. Doc. 966-2, at 3.

The government did not object to the proposed sentence reduction. D. Ct. Doc. 976 (Feb. 26, 2016). Petitioner, however, filed a pro se motion opposing her counsel's recommendation and asking the district court to reduce her sentence to a term within the 100 to 125-month range. D. Ct. Doc. 968 (Jan. 21, 2016). The district court granted the motion filed by petitioner's counsel and reduced petitioner's sentence to 179 months. Pet. App. 2-3. Petitioner filed a pro se motion for reconsideration, D. Ct. Doc. 984 (Mar. 9, 2016), which the district court denied, Pet. App. 4.

3. a. Petitioner, represented by different counsel, appealed. In her brief to the court of appeals, petitioner argued that (1) her attorney in the district court provided ineffective assistance in connection with the sentence reduction motion; (2) the district court resentenced her based on an erroneous understanding of the law; (3) due process required the district court to consider her pro se supplemental motion; (4) the district

court failed to provide an adequate explanation for her reduced sentence; and (5) the district court unreasonably departed from petitioner's advisory guidelines range in reducing petitioner's sentence. Pet. C.A. Br. 1-2, 6-8. Petitioner asked the court of appeals to vacate her sentence and remand her case "for a new, full sentencing hearing." Id. at 53.

After receiving petitioner's opening brief, the government filed a motion in the court of appeals for a remand of petitioner's case "for reconsideration and further proceedings." Gov't Mot. for Remand 1. The government explained that granting its motion "would allow the district court the opportunity to review the matter and make a complete record as to this defendant's eligibility for a sentence reduction under Amendment 782," along with other matters relevant to the sentence ultimately imposed. Id. at 1-2. The court of appeals denied the motion. 6/20/16 Order.

The government then filed an answering brief that disputed most of petitioner's claims but stated that "the record may not be clear as to the reasoning applied by the district court in setting the amended sentence." Gov't C.A. Br. 8; see id. at 2-26. Because the government "believe[d] the record [wa]s insufficient to affirm the district court's order on [petitioner]'s motion," the government again asked the court of appeals to remand the case for further proceedings to allow the district court "to clarify and

explain its decision." Id. at 19. The government noted, however, that petitioner was not entitled to the full resentencing hearing she had requested in her opening brief. Ibid.

b. While petitioner's appeal was pending, the court of appeals decided United States v. Koons, 850 F.3d at 973. Like petitioner, the defendants in Koons faced mandatory minimum sentences that superseded the guidelines ranges that would otherwise apply and were sentenced below the mandatory minimum after the district court granted government motions for § 3553(e) substantial assistance departures. Id. at 974. After the Sentencing Commission issued Amendment 782, the defendants in Koons sought sentence reductions under Section 3582(c)(2).

The government did not object to those requests, but the district court concluded that it could not grant them, and the Eighth Circuit affirmed. As relevant here, the Eighth Circuit held that the defendants were not eligible for sentence reductions under Section 3582(c)(2) because their sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Koons, 850 F.3d at 977 (quoting 18 U.S.C. 3582(c)(2)). Rather, the court determined, their sentences were "based on" the statutory mandatory minimum and their substantial assistance. Ibid. The court noted that the Tenth Circuit had recently reached a similar conclusion in United States v. C.D.,

848 F.3d 1286 (2017), petition for cert. pending, No. 16-9672 (filed June 20, 2017).

Three weeks after the Eighth Circuit decided Koons, this Court decided Dean v. United States, 137 S. Ct. at 1170. The defendant in Dean sought a one-day sentence on several robbery-related convictions, arguing that such a minimal term was appropriate because he also faced consecutive mandatory minimum sentences totaling 30 years under 18 U.S.C. 924(c) for using a firearm in committing those offenses. The district court concluded that it lacked the discretion to impose such a sentence, and the Eighth Circuit affirmed. This Court disagreed, holding that a judge considering a sentence on the predicate crimes need not "ignore the fact that the defendant will serve the mandatory minimums imposed under § 924(c)." 137 S. Ct. at 1174.

c. Roughly two months after Dean, the court of appeals issued a one-sentence order vacating the district court's disposition of petitioner's sentence reduction motion and remanding the case to the district court "for reconsideration in light of United States v. Koons, 850 F.3d 973 (8th Cir. 2017) and Dean v. United States, 137 S. Ct. 1170 (2017)." Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 1) that the Sentencing Commission's adoption of Amendment 782 "gave certain inmates the right to seek a lower sentence" under 18 U.S.C. 3582(c)(2) "without regard to

their statutory mandatory minimums." Although the government did not object to that position below, the government now agrees with the decisions in United States v. Koons, 850 F.3d 973 (8th Cir. 2017), and United States v. C.D., 848 F.3d 1286 (10th Cir. 2017), that defendants in petitioner's position are not eligible for sentence reductions under Section 3582(c)(2) because their initial sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2). Rather, such defendants were sentenced "based on" the statutory mandatory minimum, which became their "guideline sentence" under Sentencing Guidelines § 5G1.1(b), and which the Commission cannot lower.

Contrary to petitioner's suggestion (Pet. 5-10), this case does not present a suitable vehicle for addressing the question of eligibility for a sentence reduction under Section 3582(c)(2). The court of appeals did not hold that petitioner must "serve the entire 216 months" of her initial sentence. Pet. 10. The court of appeals instead issued a one-sentence order vacating petitioner's reduced sentence and remanding for reconsideration in light of Koons and Dean v. United States, 137 S. Ct. 1170 (2017). Given the interlocutory posture and petitioner's ability to argue that she is entitled to a sentence reduction irrespective of the

how the question presented is resolved, this Court's review is not warranted.[1]

1. A defendant who is subject to a statutory mandatory minimum that exceeds the otherwise-applicable guidelines range, but who substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. 3553(e), is not eligible for a subsequent sentence reduction under 18 U.S.C. 3582(c)(2).

a. Section 3582(c)(2) sets forth a "narrow exception[]" to the "rule of finality" that generally governs federal criminal sentences. Freeman v. United States, 564 U.S. 522, 526 (2011) (plurality opinion). Section 3582(c)(2) provides in full:

> [I]n 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.

18 U.S.C. 3582(c)(2).

The plain text of Section 3582(c)(2) explicitly creates a threshold eligibility requirement that limits relief to cases in

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[1] Several other pending petitions raise the question presented by petitioner here. See Kasowski v. United States, No. 16-9649 (filed June 20, 2017); C.D. v. United States, No. 16-9672 (filed June 20, 2017); Koons v. United States, No. 17-5716 (filed Aug. 22, 2017).

which the defendant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see Freeman, 564 U.S. at 527 (plurality opinion); id. at 534-535 (Sotomayor, J., concurring in the judgment); id. at 544-545 (Roberts, C.J., dissenting). That threshold eligibility requirement renders Section 3582(c)(2) inapplicable to defendants who were sentenced pursuant to a statutory mandatory minimum sentence that exceeds the otherwise-applicable guidelines range. Such a defendant's sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). It was "based on" the mandatory minimum, which became "the guideline sentence" under Sentencing Guidelines § 5G1.1(b), and which the district court was "bound" to enforce, Kimbrough v. United States, 552 U.S. 85, 107 (2007).

In such a case, the Sentencing Commission does not "subsequently * * * lower[]" the applicable "sentencing range" when, as in its adoption of Amendment 782, it lowers the sentencing range that would apply if a defendant were not subject to a mandatory minimum. 18 U.S.C. 3582(c)(2). The Commission, in fact, could not lower a sentencing range premised on a mandatory minimum, because the "Commission does not have the authority to amend [a] statute." Neal v. United States, 516 U.S. 284, 295 (1996). The Commission policy statement governing Section 3582(c)(2) sentence

reductions expressly recognizes as much, noting that a sentence reduction "is not authorized under 18 U.S.C. § 3582(c)(2)" if an amendment to the Guidelines "does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)." Sentencing Guidelines § 1B1.10, comment. (n.1(A)).

b. As multiple courts of appeals have recognized, a defendant was likewise not sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" when he is subject to a mandatory minimum that exceeds the otherwise-applicable guidelines range but received a lower sentence, pursuant to 18 U.S.C. 3553(e), that accounted for his substantial assistance to the government. Koons, 850 F.3d at 977; C.D., 848 F.3d at 1289; see also United States v. Rodriguez-Soriano, 855 F.3d 1040, 1044-1046 (9th Cir. 2017) (holding that a defendant was ineligible for a sentence reduction under Section 3582(c)(2) because the transcript in his case made clear that his sentence was "based on" the mandatory minimum).[2]

[2] By contrast, when a defendant's guidelines range is above the mandatory minimum, the court must consider that guidelines range in its sentencing decision, and the defendant accordingly may be eligible for a Section 3582(c)(2) reduction if the guidelines range is subsequently lowered by the Sentencing Commission. See, e.g., United States v. Freeman, 586 Fed. Appx. 237 (7th Cir. 2014).

Section 3553(e) provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. 994].

18 U.S.C. 3553(e). Section 3553(e) thus provides statutory authority for a court to impose a sentence below a mandatory minimum, but it expressly ties such a departure to the sentence "established by statute as a minimum sentence" and expressly limits the extent of that departure to a reflection of the defendant's substantial assistance. Ibid. Indeed, every court of appeals to address the question has concluded that a Section 3553(e) departure "must be based solely on a defendant's substantial assistance and factors related to that assistance," not on any other considerations embodied in the Guidelines. United States v. Spinks, 770 F.3d 285, 287 & n.1 (4th Cir. 2014) (emphasis added); accord United States v. Winebarger, 664 F.3d 388, 396 (3d Cir. 2011) (collecting cases), cert. denied, 134 S. Ct. 181 (2013).

c. Petitioner's contrary position, like the government's position below, relies on the policy statement appearing at Section 1B1.10(c) of the Guidelines. That statement provides:

> If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to the authorities, then for purposes of this

> policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014). Under that directive, a court considering a Section 3582(c)(2) sentence reduction motion by a defendant who received a substantial assistance reduction would calculate the "amended guideline range" without regard to the mandatory minimum. Ibid. In petitioner's case, for example, the guidelines range after Amendment 782 (absent the mandatory minimum) was 121 to 151 months, so the Section 1B1.10(c) policy statement would set that as her "amended guideline range," ibid., irrespective of Section 5G1.1(b)'s instruction that, in an ordinary case, a superseding statutory minimum becomes the "guideline sentence," Sentencing Guidelines § 5G1.1(b).

The policy statement, however, does not eliminate or supersede the statutory requirement that a defendant's original sentence have been "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). The policy statement appears, instead, to assume that any sentence involving a substantial assistance departure from a mandatory minimum satisfies that prerequisite. As explained above, such an assumption is unwarranted. When a defendant in petitioner's position receives a substantial assistance departure, the resulting sentence is still "based on" the mandatory minimum (incorporated through Sentencing Guidelines § 5G1.1(b), a

provision the Commission does not purport to amend) with a departure only to "reflect a defendant's substantial assistance," 18 U.S.C. 3553(e). Therefore, as multiple courts of appeals have recognized, granting a Section 3582(c)(2) reduction to a defendant in petitioner's position effectively reads the threshold "based on" requirement in Section 3582(c)(2) "out of the statute." Rodriguez-Soriano, 855 F.3d at 1045; see Koons, 850 F.3d at 978. The Commission's policy statement cannot permissibly be read to have that effect. See United States v. LaBonte, 520 U.S. 751, 757 (1997) (explaining that guidelines provision "at odds with [the] plain language" of a statute "must give way" to "the specific directives of Congress"); accord id. at 760 (rejecting Commission position that would "largely eviscerate" statutory requirement and render it "a virtual nullity").

2. Irrespective of any conflict in the circuits on this issue, this case is not a suitable vehicle for addressing the circumstances in which a defendant sentenced pursuant to mandatory minimum and Section 3553(e) may be eligible for a sentence reduction under Section 3582(c)(2).

a. Contrary to petitioner's contention (Pet. 10), the court of appeals' one-sentence remand order vacating the district court's disposition of petitioner's sentence reduction motion, and remanding her case in light of Koons and Dean, does not require that she "serve the entire 216 months" of her initial sentence.

Instead, it requires the district court to assess in the first instance the effect, if any, of Koons and Dean on petitioner's motion for a sentence reduction. Pet. App. 1. In addition to presenting arguments on these issues, petitioner may also be able to argue that the district court may not rescind its earlier sentence reduction under the principle of Greenlaw v. United States, 554 U.S. 237 (2008), which generally prevents a court from increasing a sentence in the absence of a government appeal or cross-appeal. Indeed, the cross-appeal rule, if it applies in this circumstance, could potentially mean that petitioner would receive a sentence reduction even if this Court ultimately held that a defendant in her position is not eligible for one.

The question of petitioner's eligibility for a sentence reduction under Section 3582(c)(2) is therefore not squarely presented for review by this Court at this interlocutory stage of the proceedings. See United States v. Williams, 504 U.S. 36, 41 (1992); see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) (an interlocutory posture "alone furnishe[s] sufficient ground for the denial of the" petition). If petitioner's predictions about the outcome of the proceedings on remand prove accurate, she can then raise her current claim --

together with any additional claims that may arise in the district court and be passed on in the court of appeals –- in a single petition for a writ of certiorari seeking review of the final decision on her Section 3582(c)(2) motion. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam).

b. A limited conflict exists between the Eighth and Tenth Circuits, which have held that defendants in petitioner's position are not eligible for sentence reductions under Section 3582(c)(2), see Koons, 850 F.3d at 977; C.D., 848 F.3d at 1289, and the Fourth Circuit, which has held in a divided decision that defendants in petitioner's position may receive such reductions, see United States v. Williams, 808 F.3d 253, 260-263 (2015); id. at 263-266 (Traxler, C.J, dissenting). The Ninth Circuit has adopted an intermediate approach, holding that defendants in petitioner's position are eligible for sentence reductions under Section 3582(c)(2) only if the sentencing transcript or other record materials in that particular case indicate that the defendant's sentence was "based on" a subsequently lowered guidelines range rather than the mandatory minimum incorporated as the guideline sentence. Rodriguez-Soriano, 855 F.3d at 1044-1046.[3] All of those

[3] Petitioner also asserts (Pet. 8-9) that the circuit conflict includes the Seventh Circuit's decision in Freeman, 586 Fed. Appx. at 237, and the Eleventh Circuit's decision in United States v. Hope, 642 Fed. Appx. 961 (2016). Both Freeman and Hope are unpublished, nonpredecential decisions that do not bind their

decisions, however, predate the government's reconsideration of its position, and the courts of appeals would benefit from the opportunity to consider the government's current view.

In any event, the posture of this case makes it unsuitable for addressing the question presented. The only relevant question at this stage is whether the court of appeals correctly decided to vacate petitioner's sentence reduction and remand the case for further proceedings. Cf. California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (citation and internal quotation marks omitted). Petitioner herself urged the court of appeals to remand for further proceedings. Given that history, the petition understandably does not directly challenge the disposition below. That deficiency, along with the procedural issues created by the conflict between petitioner and her district court counsel, further demonstrate that petitioner's case is an inappropriate vehicle for resolving the question presented.

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respective circuits. In any event, neither of those decisions implicates the relevant conflict, because the defendants in those cases were not similarly situated to the defendants in Koons, C.D., Williams, and Rodriguez-Soriano. The defendant in Freeman was subject to an initial guidelines range that exceeded the mandatory minimum, see 586 Fed. Appx. at 237, and thus was sentenced "based on" the guidelines range rather than the mandatory minimum. The defendant in Hope did not provide substantial assistance, see 642 Fed. Appx. at 964-965; and thus was not sentenced below the mandatory minimum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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