No. ____

In the Supreme Court of the United States

JODI RICHTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 20, 2017

QUESTION PRESENTED

1. Amendments 780, 782, and 788 to the Federal Sentencing Guidelines, promulgated in 2014, provide for resentencing — and a potentially much lower sentence — for certain federal prisoners without regard to their prior statutory mandatory minimums. The Fourth, Seventh, and Eleventh Circuits have confirmed this, but the Eighth, Ninth, and Tenth Circuits continue to give dispositive force to these prisoners' mandatory minimums, declaring these prisoners ineligible for resentencing. Which set of circuits is correct?

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PETITION FOR WRIT OF CERTIORARI

In 2014, the United States Sentencing Commission promulgated Amendments 780, 782, and 788 to the Federal Sentencing Guidelines. These amendments gave certain inmates the right to seek a lower sentence without regard to their statutory mandatory minimums. The Fourth, Seventh, and Eleventh Circuits have followed the clear rules that the Commission set forth, finding that these inmates are indeed eligible. The Eighth, Ninth, and Tenth Circuits, in contrast, have found that the congressional statutes mandating minimum sentences trump the amendments, making these inmates ineligible for resentencing.

Hundreds, perhaps even thousands, of inmates have sought resentencing under these amendments. Their success now depends in large part not on the merits of their cases, but on the circuit in which they fortuitously find themselves. In the Eighth, Ninth, and Tenth Circuits, these inmates will find the doors to the district court closed and locked because those circuits effectively overturned a delegated legislative action (promulgation of the amendments) in favor of a different legislative action (passage of statutory mandatory minimums).

This case offers the Court the opportunity to resolve a clear circuit split, address an issue that has confounded district and circuit courts across the country in countless cases, clarify the law that has profound and disparate consequences for inmates seeking resentencing, and address the extent to which the judicial branch may intrude upon the legislature's internal rule-making authority.

OPINION BELOW

The Eighth Circuit issued no full opinion in this case. Instead, it filed a one-sentence order vacating the judgment and remanding to district court in light of *United States v. Koons*, 850 F.3d 973 (8th Cir. 2017), and *Dean v. United States*, 137 S. Ct. 1170 (2017).

JURISDICTION

The Eighth Circuit rendered its decision on June 5, 2017. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

18 U.S.C. § 3582(c)(2), U.S.S.G. § 1B1.10(c)-(e) (which entails all relevant provisions of Amendments 780, 782, and 788), and U.S.S.G. § 5G1.1 are reproduced in the Appendix.

STATEMENT OF THE CASE

This case presents a clear, wide-ranging, and consequential circuit split that has developed in light of the United States Sentencing Commission's promulgation of Amendments 780, 782, and 788 in 2014.

In 2010, the petitioner, Jodi Richter, pleaded guilty to one count of conspiracy to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. § 846. (DCD 556, at p.1).[1] Richter's role in the conspiracy is one with which any addict is all too familiar: although she was, for a short time, part of some drug

[1] "DCD" refers to the district court docket, No. 3:10-cr-49, and the corresponding docket entry number and page number(s).

transactions in a much larger conspiracy, (PSR, pp.7-8),[2] she most often found herself to be the buyer of drugs, not a kingpin. Id. at 7. Around the time she entered the conspiracy, she was, as she put it, "crazy for anything injectable." Id. at 15.

Richter was sentenced in 2011. (DCD 649, at p.1). She faced a mandatory life sentence based on two prior drug convictions. 21 U.S.C. § 841(b)(1)(A)(viii). These convictions that supposedly made her deserving of life in prison were those of an addict: possessing a pipe on one occasion, (DCD 196-1, at p.9), and possessing two syringes and a spoon on another. (DCD 196-2, at p.7). The government filed a § 5K1.1 and § 3553(e) motion for departure for substantial assistance, (DCD 649, at p.6), releasing Richter from the mandatory life sentence.

Richter's base Federal Sentencing Guidelines level was 32. (PSR, p.9). Because she pleaded guilty and accepted responsibility, her level was lowered to 29. (Id. at 10; DCD 649, at p.5). Her criminal history — clearly that of an addict, (PSR, pp.14-16) — gave her a Criminal History Category of IV. (PSR, pp.12; DCD 649, at p.5). Her undisputed Guidelines range, therefore, was 121-151 months. (PSR, p.17; DCD 649, at pp.5-6).

At Richter's original sentencing in 2011, the government recommended a sentence of 240 months. (DCD 649, at p.9). Richter recommended a sentence within the 121-151-month Guidelines range. Id. at 11.

The district court imposed a 216-month sentence. (Id. at 19; DCD 556, at p.2).

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[2] "PSR" refers to the presentence investigation report prepared in the petitioner's case, and the corresponding page number(s).

In 2014, the United States Sentencing Commission promulgated, and Congress approved, Amendments 780, 782, and 788 to the Sentencing Guidelines. Amendment 782 reduced by two levels the offense levels assigned to drug quantities that trigger mandatory minimum sentences. U.S.S.G. 2015, App. C Supp., Am. 782. Amendment 788 made Amendment 782 retroactive. U.S.S.G. 2015, App. C Supp., Am. 788. Amendment 780 provided that upon resentencing under § 3582(c)(2), district courts are not to consider defendants' mandatory minimums. *United States v. Freeman*, 586 Fed.Appx. 237, 239 (7th Cir. 2014). All three amendments became effective on November 1, 2014. *Id.*; U.S.S.C., *2014 Drug Guidelines Amendment Retroactivity Data Report*, April 2016.

Under these new amendments, Richter's amended and undisputed Guidelines range became 100-125 months. (DCD 966, at p.3; DCD 976, at p.1; DCD 979, at p.1).

Richter and her attorney filed separate motions to reduce Richter's original sentence. (DCD 966; DCD 968). The district court reduced Richter's sentence to an above-Guidelines 179 months. (DCD 978, at p.1; DCD 979, at p.1). The court acknowledged the accuracy of the new 100-125-month range. (DCD 979, at p.1).

Richter timely filed a pro se motion for reconsideration, again requesting a Guidelines-range sentence. (DCD 984, at p.1). The district court denied her motion. (DCD 985). Richter then filed a timely pro se notice of appeal on March 7, 2016. (DCD 982, at p.1).

On appeal, Richter argued that she was eligible for a sentence reduction under § 3582(c)(2) and Amendments 782 and 788. The Eighth Circuit disagreed.

Exercising its jurisdiction under 28 U.S.C. § 1291 to review the district court's judgment, which itself had jurisdiction under 18 U.S.C. § 3231, the Eighth Circuit referred Richter to its opinion in *United States v. Koons*, in which it held that defendants who are sentenced based on a mandatory minimum are not eligible for sentencing reduction under § 3582(c)(2). 850 F.3d 973, 979 (8th Cir. 2017). In doing so, the Eighth Circuit contradicted the holdings of other circuits, resulting in a circuit split.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's holding created a circuit split on a legal issue that is both confronted by countless district and circuit courts and is of exceptional importance. Hundreds, or perhaps even thousands, of cases concerning this issue have arisen since 2014. The practical result is that a defendant who was sentenced in one circuit may be resentenced and enjoy a profoundly favorable outcome on resentencing, whereas a defendant in the very same situation but in a different circuit will find the doors to the district court closed and locked, leaving her with her original sentence and no recourse under § 3582(c)(2).

I. A circuit split exists

In *United States v. Koons*, and by reference, *Richter*, the Eighth Circuit (implicitly siding with the Ninth and Tenth Circuits) created a split between itself and the Fourth, Seventh, and Eleventh Circuits.

A. *United States v. Koons*

In *Koons*, the Eighth Circuit considered whether § 3582(c)(2) relief was available to defendants who had an initial Guidelines range below the mandatory minimum, and who were sentenced below that mandatory minimum based on the government's § 3553(e) motion for substantial assistance departure. 850 F.3d at 974.

That court held that relief was not available because the defendants' sentences were not "based on" a Guidelines range subsequently lowered by the Sentencing Commission. *Id.*[3]

The Eighth Circuit first looked to § 3582(c)(2), which permits resentencing in limited circumstances where a defendant's sentencing range has been subsequently lowered by the Sentencing Commission. *Id.* at 976.

Amendment 782 is one such circumstance, if it serves to lower a defendant's applicable Guideline range. *Id.*

The court then observed that normally § 5G1.1(b) would prevent a defendant's applicable guideline range from being lowered, *id.*, because that provision requires that where statutory mandatory minimums are greater than the maximum of the applicable Guideline range, then the statutory minimum shall be the Guideline sentence. U.S.S.G. § 5G1.1(b).

However, the federal prosecutor in *Koons* (as well as the prosecutor in Richter's case) interpreted U.S.S.G. § 1B1.10(c) to allow for a reduction, because § 1B1.10(c)

[3] Accord *United States v. C.D.*, 848 F.3d 1286 (10th Cir. 2017); *United States v. Rodriguez-Soriano*, 855 F.3d 1040 (9th Cir. 2017).

provided that an "amended guideline range shall be determined without regard to the operation of § 5G1.1." 850 F.3d at 975.

The Eighth Circuit pushed back, claiming the prosecutor, and the Sentencing Commission itself, ignored a critical "threshold question" raised by the plain language of § 3582(c)(2), which is whether the defendant was sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *Id.* at 977. The court found that the defendant's sentence was based on a mandatory minimum, not a Guidelines range. *Id.*

Contrary, then, to the Sentencing Commission and the prosecutors in *Koons* and *Richter*, the Eighth Circuit held that defendants like Koons and Richter are categorically ineligible for the sentence reduction that § 3582(c)(2) and Amendments 780, 782, and 788 provide. *Id.* at 979. This runs counter to holdings in the Fourth, Seventh, and Eleventh Circuits.

B. *United States v. Williams*

In *Williams*, the Fourth Circuit considered the case of a defendant who was sentenced just as Koons and Richter were. 808 F.3d 253, 255-56 (4th Cir. 2015). Just as Koons and Richter did, Williams sought resentencing under § 3582(c)(2). *Id.* at 256. The United States Attorney and the Probation Office both agreed that Williams was eligible. *Id.* at 255-56.

The Fourth Circuit began by acknowledging that "Congress has empowered the [Sentencing] Commission to amend the Guidelines . . . Those amendments are

effective unless 'otherwise modified or disapproved by Act of Congress.'" *Id.* at 257 (quoting 28 U.S.C. § 994).

Congress, furthermore, anticipated that the Commission can use its amendment process to resolve disagreements among courts of appeals, *id.* at 258, and that the Commission has the power to override circuit court precedent through the amendments process. *Id.*

The Fourth Circuit turned to § 3582(c)(2) and U.S.S.G. § 1B1.10(c), which together provided that defendants like Richter, Koons, and Williams are eligible for resentencing without regard to the operation of U.S.S.G. § 5G1.1. *Id.* at 260. Thus, the "applicable policy statement now requires a sentencing court to remove Guidelines section 5G1.1 from the § 3582(c)(2) eligibility determination." *Id.* at 261.

As such, the Fourth Circuit agreed with Williams, the prosecutor, and the Probation Office that Williams was eligible for a sentence reduction. *Id.* at 263.

C. *United States v. Freeman*

In *Freeman*, the Seventh Circuit held that in ruling on Amendment 780 motions for cooperators, district courts should no longer consider the effect of the statutory minimum trumping provisions of Sections 5G1.1 and 5G1.2. 586 Fed.Appx. 237, 239 (7th Cir. 2014) (citing U.S.S.G. § 1B1.10(c)).

The *Freeman* district court originally imposed a statutory minimum sentence of 240 months, which was below the defendant's Guidelines range of 292 to 365 months. *Id.* at 237. On a Rule 35(b) motion, the court later reduced the defendant's sentence to 180 months. *Id.* at 238-39. The district court denied the defendant's

motion under Section 3582(c)(2) because it had initially sentenced him based on a statutory minimum. *See id.* at 239.

The Seventh Circuit vacated the ruling and held that Freeman was eligible for resentencing because he had been sentenced to a period below his mandatory minimum. *Id.* The Seventh Circuit noted that in light of Amendment 780, Section 5G1.1 no longer limits defendants' eligibility for a reduced sentence. *Id.*

D. *United States v. Hope*

In *Hope*, the Eleventh Circuit considered the case of a defendant who had a Guideline range of 168-210 months and a statutory mandatory life sentence, and was, in fact, sentenced to life because he did not cooperate. 642 Fed.Appx. 961, 962-63 (11th Cir. 2016).

The Eleventh Circuit rejected Hope's claim only because U.S.S.G. § 1B1.10(c) is reserved for defendants, like Richter, who cooperated. *Id.* at 964-65. For defendants like Richter, then, the Eleventh Circuit held that § 1B1.10(c) permits "defendants originally sentenced below the mandatory minimum due to substantial assistance to be resentenced under § 3582(c)(2)." *Id.* at 965.

II. The issue presented is raised countless times in district and circuit courts

While it is impossible to determine just how many courts have considered the issue that *Richter* presents, it is clearly in the hundreds, and perhaps even thousands. This issue, furthermore, is relatively new, and is likely to continue to be a contentious one. Finally, this issue implicates the role that the Guidelines have

vis-à-vis statutory law, as well as the role that courts ought to play in, effectively, overturning clear Guidelines amendments in light of statute. This separation of powers issue goes to the heart of our tripartite form of government and will inevitably arise again when the Commission endeavors to promulgate future amendments.

III. The issue has profound and disparate consequences for defendants across circuits

This issue is incredibly impactful for hundreds or perhaps thousands of individual defendants across the country. Consider Jodi Richter.

Richter was initially sentenced to 216 months. With her attorney, the government, and the district court all under the belief that she was eligible for resentencing, Richter received a new sentence of 179 months. She may, in fact, have been eligible for a much lower sentence. But she snatched defeat from the jaws of victory. Not only did the Eighth Circuit reject Richter's argument for a lower sentence, but it nullified her 179-month sentence and will force her to serve the entire 216 months. She would have been better off not appealing.

Richter would have been even better off living in the Fourth, Seventh, or Eleventh Circuit, where she would have been eligible for a substantial sentencing reduction.

There are countless Richters across the country. In some circuits, they are eligible for substantial sentence reductions. In other circuits, they find the doors to the district court closed and locked. The circuit split that *Richter* represents has

wide-ranging consequences for courts, the structure of our government, and individual defendants.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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June 20, 2017

APPENDIX

TABLE OF APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-1723

United States of America

Plaintiff - Appellee

v.

Jodi Lynn Richter

Defendant - Appellant

Appeal from U.S. District Court for the District of North Dakota - Fargo
(3:10-cr-00049-RRE-12)

JUDGMENT

Before WOLLMAN, MELLOY and SHEPHERD, Circuit Judges.

The judgment is vacated and the case is remanded 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).

June 05, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

U.S. District Court
District of North Dakota (Eastern)
CRIMINAL DOCKET FOR CASE #: 3:10-cr-00049-RRE-12

Case title: USA v. Rice et al
Related Case: 3:13-cv-00090-RRE

Date Filed: 04/02/2010
Date Terminated: 02/10/2011

02/29/2016	977	(Text Only) ORDER by Chief Judge Ralph R. Erickson granting 966 Sealed Motion to Reduce Sentence - USSC Amendment as to Jodi Lynn Richter (12). (SH) (Entered: 02/29/2016)

UNITED STATES DISTRICT COURT

for the

District of North Dakota

United States of America
v.
Jodi Lynn Richter, a/k/a Nurse Betty

Case No: **3:10-cr-49-12**

USM No: **15168-041**

Date of Original Judgment: **02/10/2011**

Date of Previous Amended Judgment: _____

(Use Date of Last Amended Judgment if Any)

Timothy Langley

Defendant's Attorney

ORDER REGARDING MOTION FOR SENTENCE REDUCTION PURSUANT TO 18 U.S.C. § 3582(c)(2)

Upon motion of ☑ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion, and taking into account the policy statement set forth at USSG §1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable,

IT IS ORDERED that the motion is:

☐ DENIED. ☑ GRANTED and the defendant's previously imposed sentence of imprisonment *(as reflected in the last judgment issued)* of **216** months **is reduced to** **179 months** .

(Complete Parts I and II of Page 2 when motion is granted)

Except as otherwise provided, all provisions of the judgment dated **02/10/2011** shall remain in effect.

IT IS SO ORDERED.

Order Date: **02/29/2016**

/s/ Ralph R. Erickson
Judge's signature

Effective Date: _____
(if different from order date)

U.S. Chief District Judge
Printed name and title

U.S. District Court
District of North Dakota (Eastern)
CRIMINAL DOCKET FOR CASE #: 3:10-cr-00049-RRE-12

Case title: USA v. Rice et al
Related Case: 3:13-cv-00090-RRE

Date Filed: 04/02/2010
Date Terminated: 02/10/2011

03/18/2016	985	(Text Only) ORDER by Chief Judge Ralph R. Erickson denying 984 Motion for Reconsideration as to Jodi Lynn Richter (12). (SH) (Entered: 03/18/2016)

United States Court of Appeals
For the Eighth Circuit

No. 15-3794

United States of America

Plaintiff - Appellee

v.

Timothy D. Koons

Defendant - Appellant

No. 15-3825

United States of America

Plaintiff - Appellee

v.

Kenneth Jay Putensen

Defendant - Appellant

No. 15-3854

United States of America

Plaintiff - Appellee

v.

Randy Feauto

Defendant - Appellant

No. 15-3880

United States of America

Plaintiff - Appellee

v.

Esequiel Gutierrez

Defendant - Appellant

No. 15-3894

United States of America

Plaintiff - Appellee

v.

Jose Manuel Gardea

Defendant - Appellant

Appeals from United States District Court
for the Northern District of Iowa - Sioux City

Submitted: October 19, 2016
Filed: March 10, 2017

Before WOLLMAN, LOKEN, and BENTON, Circuit Judges.

LOKEN, Circuit Judge.

In these consolidated appeals, five defendants convicted of methamphetamine conspiracy offenses appeal denial of their motions for sentence reductions under 18 U.S.C. § 3582(c)(2). For all five, the initial advisory guidelines range was entirely below the statutory mandatory minimum, and each was sentenced below that minimum after the district court granted government motions for § 3553(e) substantial assistance departures. The question is whether § 3582(c)(2) relief is now available because Amendment 782 to the Guidelines retroactively reduced by two levels the base offense levels assigned to drug quantities, lowering the advisory guidelines range for most drug offenses. We conclude that these defendants are not eligible for a § 3582(c)(2) reduction because their sentences were not "based on" a guidelines range subsequently lowered by the Sentencing Commission. Thus, we affirm the district court's denial of sentencing reductions on a different ground.

I.

In November 2012, Randy Feauto pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine and unlawful possession of a firearm. Feauto's advisory guidelines range was 168 to 210 months in prison, but the conspiracy offense mandated a statutory minimum 20-year sentence, which

became his guidelines sentence under U.S.S.G. § 5G1.1(b). The government moved for a substantial assistance downward departure. See 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1. The government recommended a ten percent reduction because Feauto had continued dealing drugs while assisting law enforcement by making controlled buys from drug dealers. The district court imposed a 132-month sentence, 45 percent below the mandatory minimum.

After Amendment 782 became effective on November 1, 2014, the district court initiated a § 3582(c)(2) proceeding to determine whether Feauto was eligible for a sentence reduction. The United States Probation Office calculated his amended guidelines range to be 121 to 151 months in prison, disregarding § 5G1.1 of the Guidelines, as U.S.S.G. § 1B1.10(c) instructs. Promulgated by the Commission in Amendment 780, § 1B1.10(c) provides, with emphasis added:

> Cases Involving Mandatory Minimum Sentences and Substantial Assistance. 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 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).

This appeared to make Feauto eligible for discretionary § 3582(c)(2) relief that could reduce his sentence to as low as 67 months, a reduction comparable to the initial 45 percent substantial assistance reduction. See U.S.S.G. § 1B1.10, cmt. n.4.

At the § 3582(c)(2) motion hearing, the district court commented, "I don't see how a retroactive guideline can essentially trump a mandatory minimum like it does in this case," and ordered briefing on the issue. The government and Feauto agreed

he was eligible for a reduction, but disagreed as to whether the district court should exercise its discretion to reduce his sentence. After giving the parties an opportunity to comment on its tentative decision, the court ruled that the Sentencing Commission exceeded its authority in promulgating a guideline, § 1B1.10(c), that nullifies the statutory minimum sentence, or that Congress violated the non-delegation doctrine and separation-of-powers principles if it granted that authority. Accordingly, the district court concluded, Feauto was not eligible for § 3582(c)(2) relief because he "was subject to a mandatory minimum sentence exceeding both his original guideline range and his amended guideline range." United States v. Feauto, 146 F. Supp. 3d 1022, 1041 (N.D. Iowa 2015). This decision was consistent with controlling Eighth Circuit precedent prior to the adoption of § 1B1.10(c) in November 2014. See United States v. Moore, 734 F.3d 836, 838 (8th Cir. 2013).

The other four appellants were likewise convicted of drug conspiracy offenses mandating statutory minimum sentences greater than their entire advisory guidelines ranges -- Timothy Koons (20-year mandatory minimum), Kenneth Jay Putensen (life), Jose Gardea (10 years), and Esequiel Gutierrez (20 years). Each was granted a substantial assistance reduction below the mandatory minimum sentence -- Koons to 180 months (25 percent); Putensen to 264 months (35 percent); Gardea to 84 months (30 percent); and Gutierrez to 192 months (36 percent). Amendment 782 lowered their amended guidelines ranges further below the mandatory minimum, calculated in accordance with § 1B1.10(c). The district court denied § 3582(c)(2) sentencing reductions, relying on its ruling in Feauto. These appeals followed. We review defendants' eligibility for § 3582(c)(2) sentence reductions *de novo*. United States v. Bogdan, 835 F.3d 805, 807 (8th Cir. 2016).

II.

Providing a rare exception to the finality of criminal judgments, § 3582(c)(2) allows a district court to 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 . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The applicable policy statement, U.S.S.G. § 1B1.10, provides that a defendant is eligible for a discretionary § 3582(c)(2) reduction if his applicable guidelines range is lowered by a retroactive amendment listed in § 1B1.10(d), such as Amendment 782. See U.S.S.G. § 1B1.10(a). The extent of a § 3582(c)(2) reduction is normally limited to the bottom of the amended guidelines range, but if the defendant initially received a sentence below the initial guidelines range by reason of a substantial assistance reduction, "a reduction comparably less than the amended guideline range . . . may be appropriate." § 1B1.10(b)(2)(B).

For a defendant to be eligible for § 3582(c)(2) relief under U.S.S.G. § 1B1.10(a), Amendment 782 must lower his applicable guideline range. A conflict in the circuits developed regarding how to determine eligibility when the applicable guidelines range is affected by a mandatory minimum sentence. Some circuits held that a retroactive amendment did not have the effect of lowering the defendant's applicable guidelines range because, by reason of § 5G1.1(b), the amended and original range were both determined by the mandatory minimum. See, e.g., United States v. Joiner, 727 F.3d 601, 608-09 (6th Cir. 2013), cert. denied, 134 S. Ct. 1357 (2014); United States v. Johnson, 732 F.3d 109, 114-15 (2d Cir. 2013); United States v. Baylor, 556 F.3d 672, 673 (8th Cir. 2009). In promulgating § 1B1.10(c), the Commission explained that "circuits are split over what to use as the bottom of the [amended] range." The Commission "generally adopt[ed]" the approach of the Third Circuit and the D.C. Circuit -- when a defendant's initial guidelines range was entirely below the mandatory minimum, "the bottom of the amended range [is] . . . the

bottom of the Sentencing Table guideline range," disregarding § 5G1.1(b). U.S.S.G. App. C, Amend. 780, at 56 (Supp. 2015), citing United States v. Savani, 733 F.3d 56, 66-67 (3d Cir. 2013), and In re Sealed Case, 722 F.3d 361, 369-70 (D.C. Cir. 2013).[1]

The government's interpretation of § 1B1.10(c) makes defendants eligible for § 3582(c)(2) reductions, contrary to our controlling prior precedents. See Moore, 734 F.3d at 838; Baylor, 556 F.3d at 673. On appeal, the government argues that § 1B1.10(c) requires us to reexamine these precedents and urges us to follow the Fourth Circuit panel majority in United States v. Williams, 808 F.3d 253 (4th Cir. 2015). Defendants are eligible for discretionary § 3582(c)(2) reductions, the government argues, because § 3582(c)(2) authorizes a reduction based on a defendant's substantial assistance if it is "consistent with applicable policy statements issued by the Sentencing Commission."

As we noted in Bogdan, 835 F.3d at 807, the government, like the Commission, ignores a critical "threshold question" raised by the plain language of § 3582(c)(2), namely, whether each defendant was sentenced "*based on* a sentencing range that has subsequently been lowered by the Sentencing Commission." § 3582(c)(2) (emphasis added); see Dillon v. United States, 560 U.S. 817, 821 (2010). Like the defendants in this case, Joseph Bogdan's guidelines range was entirely below the mandatory minimum, and he received an initial sentence below the mandatory minimum for his substantial assistance. We did not answer this threshold question in Bogdan because that case turned on the application of the Supreme Court's decision in Freeman v.

[1]In deciding these appeals, we accept the Commission's resolution of conflicting judicial interpretations of the term "applicable guideline range" in U.S.S.G. § 1B1.10(a). "[P]rior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation" provided it does not violate the Constitution or a federal statute and is not plainly erroneous. Stinson v. United States, 508 U.S. 36, 46 (1993). The district court concluded that § 1B1.10(c) is constitutionally flawed, an issue we do not address.

United States, 564 U.S. 522 (2011), to defendant Bogdan's Rule 11(c)(1)(C) plea agreement. But we were "inclined to agree with Fourth Circuit Chief Judge William Traxler that, in this situation, the sentence would not be based on a range the Sentencing Commission subsequently lowered, 'because it was not based on a *sentencing range* in the first instance.'" Id. at 808, quoting Williams, 808 F.3d at 264 (Traxler, C.J., dissenting). "The more logical interpretation would be that the [term of imprisonment] was based on the mandatory minimum, not on a guidelines range." Bogdan, 835 F.3d at 809.

With the issue now fully briefed and argued, we adhere to our tentative conclusion in Bogdan. When the district court grants a § 3553(e) substantial assistance motion and grants a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point. See United States v. Billue, 576 F.3d 898, 904-05 (8th Cir.), cert. denied, 558 U.S. 1058 (2009). Any "reduction below the statutory minimum must be based exclusively on assistance-related considerations." United States v. Williams, 474 F.3d 1130, 1131 (8th Cir. 2007); see Feauto, 146 F. Supp. 3d at 1036, 1039. In these cases, each defendant's prison term was "based on" his statutory mandatory minimum sentence and his substantial assistance. The guidelines range "artificially established by § 5G1.1(b)" depended upon the mandatory minimum. Bogdan, 835 F.3d at 809. If § 5G1.1(b) did not exist, the district court would still have set these defendants' sentences at the mandatory minimum before considering a substantial assistance departure. And if initially sentenced today with Amendment 782 in effect, the defendants would be "stuck with that mandatory minimum sentence as a 'starting point' for any substantial assistance reduction." Feauto, 146 F. Supp. 3d at 1037. "In essence, the advisory sentencing range became irrelevant." Williams, 808 F.3d at 264 (Traxler, C.J., dissenting).

We respectfully decline to follow the Fourth Circuit panel majority in Williams. In United States v. Hood, 556 F.3d 226 (4th Cir.), cert. denied, 558 U.S.

921 (2009), an earlier Fourth Circuit panel concluded: "Because Hood's 240-month Guidelines sentence was based on a statutory minimum and U.S.S.G. § 5G1.1(b), it was not *based on* a sentencing range lowered by Amendment 706, and at this point in the analysis, Hood would not be eligible for a reduced sentence under § 3582(c)(2)." Hood, 556 F.3d at 233. Likewise, in Moore, 734 F.3d at 838, we held that "Moore's sentence was based on a statutory mandatory minimum term of imprisonment. Accordingly, Amendment 750 does not apply . . . and Moore is not eligible for relief under section 3582(c)(2)." Then-Chief Judge Traxler's dissent in Williams specifically relied on Hood's statutory "based on" analysis, 808 F.3d at 265-66, yet the Williams majority concluded that Hood was simply "inapplicable" after Amendment 780, ignoring altogether that "based on" is a statutory prerequisite of § 3582(c)(2) eligibility, id. at 261.

The Commission in Amendment 780 also ignored this "based on" statutory requirement, despite numerous circuit court decisions such as Hood and Moore that had considered this a critical, if not determinative, issue. For example, in "generally" adopting the Third Circuit and D.C. Circuit "approach," the Commission did not acknowledge the D.C. Circuit's analysis of the "based on" requirement in In re Sealed Case, 722 F.3d at 365-66, nor the fact that the Third Circuit in Savani, 733 F.3d at 67, after concluding that "applicable guideline range" in § 1B1.10(a)(2)(B) was ambiguous and should be construed in favor of the defendants under the Rule of Lenity, remanded for consideration of whether defendants' sentences were "based on" a guidelines range in light of Freeman. See also United States v. Glover, 686 F.3d 1203, 1208 (11th Cir. 2012).

The Commission's failure to consider the meaning of the term "based on" in § 3582(c)(2) is especially perplexing given the Supreme Court's recent decision in Freeman. That case turned on whether a defendant who was sentenced in accordance with a Rule 11(c)(1)(C) plea agreement was *ineligible* for a § 3582(c)(2) reduction because his sentence was "based on" the plea agreement, rather than on a lowered

sentencing range. Five Justices held that the sentence was based on the plea agreement. See 564 U.S. at 535 (Sotomayor, J., concurring), 545 (Roberts, C.J., dissenting). The dissenters acknowledged that a defendant's sentence is "based on" a guidelines range when his Rule 11(c)(1)(C) plea agreement "expressly provid[ed] that the court will sentence the defendant within an applicable Guidelines range." Id. at 546. Justice Sotomayor concurred in the result, concluding the defendant is also eligible for relief if the plea agreement "make[s] clear that the basis for the specified [prison] term is [an applicable] Guidelines sentencing range." Id. at 539. The plurality, in the minority on this issue, concluded that the sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement is "based on" the applicable guidelines range considered by the district court in accepting the agreement. Id. a 529.

The reasoning *of all nine Justices* in Freeman required a greater substantive relationship between the plea agreement and a guidelines range than the fictional relationship between a mandatory minimum sentence required by statute and a guidelines "range" determined by § 5G1.1(b). A § 5G1.1(b) artificial range in no substantive way "serves as the basis or foundation for the term of imprisonment." Id. at 535 (Sotomayor, concurring). Justice Sotomayor's concurring opinion controls in construing Freeman. See United States v. Browne, 698 F.3d 1042, 1045 (8th Cir. 2012), cert. denied, 133 S. Ct. 1616 (2013). But all nine Justices construed the term "based on" as imposing a substantive limitation on § 3582(c)(2) relief, a limitation inconsistent with the examples discussed by the Commission in Amendment 780, and with the result reached by the Fourth Circuit majority in Williams.

Congress has declared that the Commission's guidelines and policy statements shall "establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." 28 U.S.C. § 994(b)(1). But the Commission's interpretation of § 3582(c)(2) ignores the statute's plain text as construed in Freeman -- defendants' sentences were "based on" the mandatory minimum and their

substantial assistance, not on "a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Once the Supreme Court determines the meaning of a statute, courts "assess an agency's later interpretation of the statute against that settled law." Neal v. United States, 516 U.S. 284, 295 (1996). "[T]he Commission does not have the authority to amend [a] statute" the Supreme Court has construed. Id. at 290; see United States v. Stoneking, 60 F.3d 399, 402 (8th Cir. 1995) (en banc). "If the Commission's revised commentary is at odds with [§ 3582(c)(2)'s] plain language, it must give way." United States v. LaBonte, 520 U.S. 751, 757 (1997). Nor can "the Sentencing Commission . . . overrule circuit precedent interpreting a *statutory* provision." Williams, 808 F.3d at 266 (Traxler, C.J., dissenting).[2]

For these reasons, we conclude that the defendants are ineligible for § 3582(c)(2) sentencing reductions because their initial sentences were not "based on" a guidelines range lowered by Amendment 782. Accord United States v. C.D., No. 15-3318+, 2017 WL 694483 (10th Cir. Feb. 22, 2017). Accordingly, the district court orders denying § 3582(c)(2) reductions are affirmed.

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[2]The original Commentary to § 5G1.1 stated, more plainly than the amended version, "[i]f the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control." U.S.S.G. App. C, Vol. 1, Amend. 286.

18 U.S.C. § 3582(c)(2)

(c) Modification of an Imposed Term of Imprisonment. — The court may not modify a term of imprisonment once it has been imposed except that —

. . . .

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission 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.

U.S.S.G. § 1B1.10(c)-(e)

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance. — 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 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).

(d) Covered Amendments. — Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction. —

(1) The court shall 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.

U.S.S.G. § 5G1.1

Sentencing on a Single Count of Conviction

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where 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.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence –

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.