No. 17-5716

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA, PETITIONERS

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 a defendant who is subject to a statutory mandatory minimum sentence, but who substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. 3553(e), is eligible for a further sentence reduction under 18 U.S.C. 3582(c)(2), when the Sentencing Commission retroactively lowers the advisory Sentencing Guidelines range that would have applied in the absence of the statutory mandatory minimum.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 850 F.3d 973. The opinion of the district court is reported at 146 F. Supp. 3d 1022.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12) was entered on March 10, 2017. A petition for rehearing was denied on May 25, 2017 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on August 22, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the Northern District of Iowa, petitioners Timothy D. Koons, Kenneth Jay Putensen, Randy Feauto, Esequiel Gutierrez, and Jose Manuel Gardea were convicted, in separate criminal cases, of conspiracy to distribute a controlled substance (methamphetamine), in violation of 21 U.S.C. 846, and other offenses. See Pet. App. A3. Petitioners Koons, Putensen, Feauto, Gutierrez, and Gardea were sentenced, respectively, to 180, 264, 132, 192, and 84 months in prison. Id. at A5. After the Sentencing Commission lowered the advisory Sentencing Guidelines ranges for most drug offenses, see Sentencing Guidelines App. C Supp., Amend. 782, 788 (Nov. 1, 2014), the court requested, on its own motion, that the parties address whether petitioners should receive sentence reductions pursuant to 18 U.S.C. 3582(c)(2). The district court denied the reductions, finding petitioners ineligible. Pet. App. A5. The court of appeals affirmed. Id. at A1-A11.

1. This joint petition is brought by five petitioners who, at various points between 2008 and 2014, pleaded guilty to conspiracy to distribute methamphetamine (among other offenses) after having been convicted of one or more prior felony drug offenses. As set forth below, all five petitioners were subject to a statutory mandatory-minimum sentence that exceeded the otherwise-applicable advisory Guidelines range, but substantially

assisted the government and received sentences below the mandatory minimum pursuant to 18 U.S.C. 3553(e). See Pet. App. A3-A5.

a. In 2010, petitioner Koons pleaded guilty to conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 846, and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1). Presentence Investigation Report (Koons PSR) ¶¶ 2, 3, 8. Because he had a prior felony drug conviction, petitioner Koons was subject to a mandatory minimum sentence of 20 years in prison, 21 U.S.C. 841(b)(1)(A)(viii). Koons PSR ¶¶ 7, 40, 91. 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 2009 Sentencing Guidelines had petitioner Koons not been subject to that statutory mandatory minimum was 151 to 188 months in prison. Koons PSR ¶ 92. The government moved for a departure from the mandatory-minimum sentence, pursuant to 18 U.S.C. 3553(e), to reflect petitioner Koons's substantial assistance, see Koons Sentencing Hr'g Mins., and the district court sentenced him

to 180 months in prison, to be followed by ten years of supervised release. Koons Original J. 2-3.

b. In 2008, petitioner Putensen pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. 846. Presentence Investigation Report (Putensen PSR) ¶ 1. Because he had two prior felony drug convictions, petitioner Putensen was subject to a mandatory minimum sentence of life imprisonment, 21 U.S.C. 841(b)(1)(A)(viii). Putensen PSR ¶¶ 2, 27, 41, 45, 83. Without the mandatory minimum, his advisory guidelines range would have been 188 to 235 months in prison. Id. ¶ 83. After granting the government's substantial-assistance motion, see Putensen Sentencing Tr. 3, 20, the district court sentenced petitioner Putensen to 264 months in prison, to be followed by ten years of supervised release. Putensen Original J. 2-3.

c. In 2013, petitioner Feauto pleaded guilty to conspiracy to manufacture methamphetamine and distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. 846, and unlawful possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Presentence Investigation Report (Feauto PSR) ¶¶ 1-2. Because he had a prior felony drug conviction, petitioner Feauto was subject to a mandatory minimum sentence of 20 years in prison, 21 U.S.C. 841(b)(1)(A)(viii). Feauto PSR ¶¶ 48, 75. Without the mandatory minimum, his advisory guidelines range would have been 168 to 210

months in prison. Id. ¶ 76. After granting the government's substantial-assistance motion, see Feauto Sentencing Tr. 3, 27, the district court sentenced petitioner Feauto to 132 months in prison, to be followed by ten years of supervised release. Feauto Original J. 2-3.

d. In 2014, petitioner Gutierrez pleaded guilty to conspiracy to distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. 846. Presentence Investigation Report (Gutierrez PSR) ¶¶ 1, 3. Because he had a prior felony drug conviction, petitioner Gutierrez was subject to a mandatory minimum sentence of 20 years in prison, 21 U.S.C. 841(b)(1)(A)(viii). Gutierrez PSR ¶¶ 1, 26, 71. Without the mandatory minimum, his advisory guidelines range would have been 188 to 235 months in prison. Id. ¶ 72. After granting the government's substantial-assistance motion, see Gutierrez Sentencing Hr'g Mins., the district court sentenced petitioner Gutierrez to 192 months in prison, to be followed by ten years of supervised release. Gutierrez Original J. 2-3.

e. In 2014, petitioner Gardea pleaded guilty to conspiracy to distribute 5 grams or more of actual methamphetamine, in violation of 21 U.S.C. 846. Presentence Investigation Report (Gardea PSR) ¶¶ 1, 3. Because he had a prior felony drug conviction, petitioner Gardea was subject to a mandatory minimum sentence of 10 years in prison, 21 U.S.C. 841(b)(1)(B)(viii).

Gardea PSR ¶¶ 1, 26, 76. Without the mandatory minimum, his advisory guidelines range would have been 70 to 87 months in prison. Id. ¶ 77. After granting the government's substantial-assistance motion, see Gardea Sentencing Hr'g Mins., the district court sentenced petitioner Gardea to 84 months in prison, to be followed by eight years of supervised release. Gardea Original J. 2-3.

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 specified in 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," ibid., 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," 18 U.S.C. 3582(c)(2).

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 2015, the district court issued, on its own motion, orders directing petitioners and the government to address whether petitioners should receive sentence reductions pursuant to 18 U.S.C. 3582(c)(2). See, e.g., Koons D. Ct. Doc. 89 (Mar. 6, 2015). Petitioners contended that they were eligible under the statute and requested reductions from the amended guidelines ranges that would apply in the absence of a mandatory minimum proportional to the reductions from the mandatory minimums that they received at their initial sentencings. See, e.g., Koons D. Ct. Doc. 96 at 2 (July 17, 2015).

With respect to eligibility, petitioners relied on the policy statement in Section 1B1.10(c) of the Guidelines to argue that the district court should disregard the mandatory minimums. See, e.g., Koons D. Ct. Doc. 96 at 2. 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). The government agreed that petitioners were eligible to be considered for sentence reductions, but maintained that the district court should, in its discretion, decline to grant reductions in petitioners' cases or, at most, grant lesser reductions than those urged by petitioners. See, e.g., Koons Gov't Section 3582(c)(2) Report at 2.

The district court denied petitioners' requests for sentence reductions, finding them ineligible under 18 U.S.C. 3582(c)(2). The court set forth its rationale in petitioner Feauto's case. 146 F. Supp. 3d 1022. The court reasoned that Section 1B1.10(c) amounted to "a complete 'nullification' or 'disregarding' of the mandatory minimum" because the substantial assistance reduction in the amended sentence would be "entirely detached from, or made without regard to, the mandatory minimum." Id. at 1030. The court explained that such an outcome would exceed the Sentencing Commission's statutory authority because Congress did not authorize the Commission to ignore or rewrite statutory mandatory minimums. Id. at 1035.[1]

[1] The district court also stated that if Congress did "tacitly" grant the Commission authority to promulgate Section 1B1.10(c), the statute would violate the non-delegation doctrine and separation-of-powers principles. 146 F. Supp. 3d at 1040. The court of appeals declined to address that alternative reasoning. See Pet. App. A7 n.1.

3. The court of appeals affirmed. Pet. App. A1-A11. The court explained that petitioners 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." Id. at A7 (quoting 18 U.S.C. 3582(c)(2)). Rather, the court determined, petitioners' sentences were "based on" the statutory mandatory minimum and their substantial assistance. Id. at A8.

The court of appeals observed that "[w]hen the district court 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." Pet. App. A8. The court further observed that Section 3533(e) -- the statute allowing a court to impose a sentence below the mandatory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense," 18 U.S.C. 3553(e) -- requires that "[a]ny 'reduction below the statutory minimum * * * be based exclusively on assistance-related considerations.'" Pet. App. A8 (quoting United States v. Williams, 474 F.3d 1130, 1131 (8th Cir. 2007)). The court accordingly concluded that "[i]n these cases, each [petitioner's] prison term was 'based on' his statutory mandatory minimum sentence and his substantial assistance," without regard to any other guidelines range. Ibid.

The court of appeals found support for its conclusion in the fact that "the district court would still have set these [petitioners'] sentences at the mandatory minimum before considering a substantial assistance departure," even if the Sentencing Guidelines did not themselves require that the mandatory minimum become the guidelines range. Pet. App. A8. The court noted that even if "initially sentenced today," under the amended Guidelines, petitioners would be "stuck with the mandatory minimum sentence as a starting point for any substantial assistance reduction." Ibid. (internal quotation marks and citation omitted). "In essence," the court explained, "the advisory sentencing range became irrelevant." Ibid. (citation omitted).

The court of appeals also found support for its conclusion in this Court's decision in Freeman v. United States, 564 U.S. 522 (2011). See Pet. App. A9-A10. The question in Freeman was whether a defendant who pleaded guilty under a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement recommending a specific sentence is eligible for a Section 3582(c)(2) reduction if his Guidelines range, which was also set forth in the plea agreement, is subsequently lowered. The court of appeals reasoned from the three separate opinions in Freeman that "all nine Justices construed the term 'based on' as imposing a substantive limitation on § 3582(c)(2) relief" -- a limitation "inconsistent" with applying Section 1B1.10(c) as petitioners urged. Pet. App. A10.

The court of appeals 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). The court also recognized (Pet. App. A8-A9) that its holding diverged from that of the Fourth Circuit's divided panel decision in United States v. Williams, 808 F.3d 253 (2015); see id. at 263 (Traxler, C.J., dissenting).

ARGUMENT

Petitioners contend (Pet. 9) that the Sentencing Commission's adoption of Amendment 782 made them "eligib[le] for consideration for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2)" without regard to the fact that they are subject to statutory mandatory minimums. Although the government did not object to that position below, the government now agrees with the court of appeals' decision in this case and with the Tenth Circuit's holding in United States v. C.D., 848 F.3d 1286 (2017), petition for cert. pending, No. 16-9672 (filed June 20, 2017), that defendants in petitioners' 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.

Because the court of appeals correctly resolved the question presented and because the limited conflict identified by petitioners is recent, shallow, and unripe for this Court's intervention, no further review is warranted.[2]

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).

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[2] Other pending petitions also raise the question presented by petitioners here. See Kasowski v. United States, No. 16-9649 (filed June 16, 2017); Richter v. United States, No. 16-9695 (filed June 20, 2017); C.D., No. 16-9672, supra; Rodriguez-Soriano v. United States, No. 17-6292 (filed Oct. 6, 2017).

The plain text of Section 3582(c)(2) explicitly creates a threshold eligibility requirement that limits relief to cases in 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 also 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, 290 (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) (emphasis omitted)).

b. As the decision below and two other 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," 18 U.S.C. 3582(c)(2), 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. Pet. App. A7-A8; 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), petition for cert. pending, No. 17-6292 (filed Oct. 6, 2017).[3]

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 exclusively on assistance-related considerations," not on any other considerations embodied in the Guidelines. Pet. App. A8 (emphasis added; citation omitted); accord United States v. Winebarger, 664 F.3d 388, 396 (3d Cir. 2011) (collecting cases), cert. denied, 134 S. Ct. 181 (2013).

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[3] 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).

c. Petitioners' contrary contentions lack merit. Petitioners, like the government in the proceedings below, rely 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 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 Feauto's case, for example, the guidelines range after Amendment 782 (absent the mandatory minimum) was 168 to 210 months, so the Section 1B1.10(c) policy statement would set that as his "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" in order to qualify for a sentence reduction. 18 U.S.C. 3582(c)(2). The policy statement appears, instead, to assume -- as do petitioners, see, e.g., Pet. 12, 14 -- that any sentence involving a substantial assistance departure from a mandatory minimum satisfies that prerequisite. As explained above, that assumption is unwarranted. When a defendant in petitioners' position receives a substantial assistance departure, the resulting sentence is still "based on" the mandatory minimum (which is also 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 petitioners' 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 Pet. App. A9-A10. 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").

Petitioners contend (Pet. 16) that the Sentencing Commission "can be its own lexicographer" and supersede the ordinary effect of Sentencing Guidelines § 5G1.1(b) "in the very limited context of cases where an 18 U.S.C. § 3553(e) motion has been granted." Amendment 782, however, did not purport to amend Sentencing Guidelines § 5G1.1(b) or change how that provision operates in the computation of a defendant's initial sentence. See Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014). And, in any event, the Commission lacks authority to amend or supersede the statutory mandatory minimum or the statutory requirement that substantial-assistance reductions below a defendant's mandatory minimum be based exclusively on assistance-related considerations.

Contrary to petitioners' contention (Pet. 17-20), the court of appeals correctly recognized that petitioners' ineligibility for a sentence reduction under Section 3582(c)(2) is supported by Freeman, supra. Freeman addressed the applicability of 18 U.S.C. 3582(c)(2) in the context of Rule 11(c)(1)(C) plea agreements. See 564 U.S. at 525 (plurality). Although no opinion in Freeman commanded the vote of five Justices, all nine Justices read Section 3582(c)(2)'s "based upon" requirement to constitute a "substantive" threshold requirement that limits sentencing reductions to cases in which the otherwise-applicable Guidelines range could affect the sentence imposed. See id. at 529; id. at 535-536 (Sotomayor, J., concurring in the judgment); id. at 544

(Roberts, C.J., dissenting). That requirement is not met where, as here, the sentencing court is required to base any departure from the statutory mandatory minimum exclusively on substantial-assistance-related considerations. See p. 15, supra.

2. As petitioners note (Pet. 8-9, 16), a limited conflict exists between the Eighth and Tenth Circuits, which have held that defendants in petitioners' position are not eligible for sentence reductions under Section 3582(c)(2), see Pet. App. A8-A9; C.D., 848 F.3d at 1289, and the Fourth Circuit, which has held in a divided decision that defendants in petitioners' 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 petitioners' 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.

That limited conflict does not warrant this Court's intervention at this time. The disagreement is of recent vintage, and only one court of appeals (the Fourth Circuit in Williams) has taken a position inconsistent with the decision below. The

dissenting judge in Williams, moreover, viewed that decision to conflict with the Fourth Circuit's own prior holding in United States v. Hood, 556 F.3d 226, 233, cert. denied, 558 U.S. 921 (2009), where another panel held, before Section 1B1.10(c) was promulgated, that the sentence of a defendant in petitioners' position "was not 'based on' the sentencing range * * * that was [subsequently] lowered by" a Guidelines amendment. Id. at 236; see Williams, 808 F.3d at 264-266 (Traxler, C.J., dissenting). Particularly because Williams predated the government's reconsideration of its position, the Fourth Circuit and other courts of appeals would benefit from the opportunity to consider the government's current view. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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