NO. 17-5716

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2016

Timothy D. Koons,
Kenneth Jay Putensen,
Randy Feauto,
Esequiel Gutierrez, and
Jose Manuel Gardea. - PETITIONERS,

vs.

United States of America, - RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Eighth Circuit Court of Appeals erred in holding, contrary to the opinion of the Fourth Circuit Court of Appeals, that defendants whose initial advisory guideline sentencing range was below a statutory mandatory minimum and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), are not eligible for further reduction in sentence under 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline Amendment 782, which lowered the base offense levels assigned to most drug quantities?

(2) Whether *Freeman v. United States*, 564 U.S. 522 (2011) (plurality opinion) supports the holding that there is a substantive limitation on the term "based on" in 18 U.S.C. § 3582(c)(2) that prohibits defendants whose initial advisory guideline range was below a statutory mandatory minimum, and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), from being eligible for further reduction in sentence due to retroactive sentencing guideline Amendment 782?

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Timothy D. Koons, Kenneth Jay Putensen, Randy Feauto, Esequiel Gutierrez, and Jose Manuel Gardea, through counsel, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in consolidated case Nos. 15-3794, 15-3825, 15-3854, 15-3880, and 15-3894, entered on March 10, 2017. Defendants' petition for rehearing en banc and petition for rehearing by the panel were denied on May 25, 2017.

OPINION BELOW

On March 10, 2017, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is published and available at 850 F.3d 973.

JURISDICTION

The Court of Appeals entered its judgment on March 10, 2017, and denied Defendants' petition for rehearing en banc and petition for rehearing by the panel on May 25, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING POLICY STATEMENTS INVOLVED

18 U.S.C. § 3553 (2012):

> **(e) Limited authority to impose a sentence below a statutory minimum.**—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 section 994 of title 28, United States Code.

18 U.S.C. § 3582(c) (2012):

> 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 the applicable policy statements issued by the Sentencing Commission.

28 U.S.C. § 994 (2012):

> **(n)** The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.
>
> ***(o)*** The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.
>
> **(u)** If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

USSG §1B1.10 (Policy Statement) (2016):

> (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 the 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).

STATEMENT OF THE CASE

This is a consolidated direct appeal by defendants, Randy Feauto (hereinafter Feauto), Jose M. Gardea (hereinafter Gardea), Esequiel Gutierrez (hereinafter Gutierrez), Timothy D. Koons (hereinafter Koons), and Kenneth Jay Putensen (hereinafter Putensen), following the district court's denial of their sentence reductions pursuant to 18 U.S.C. § 3582(c)(2), implementing retroactive guideline amendment 782 to the United States Sentencing Guidelines pursuant to policy statement USSG § 1B1.10(c). The United States District Court had original jurisdiction over the appellants' federal criminal prosecutions.

On June 25, 2013, defendant Feauto was sentenced to 132 months of imprisonment, having pled guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 851; and to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (*Feauto* DCD 42, 55).[1] At sentencing, the district court found a total offense level of 33, at criminal history category III, for an advisory sentencing range of 168 to 210 months of

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[1] In this brief, the following abbreviation will be used:
"DCD" -- district court clerk's record, preceded by defendant's name and followed by docket entry and page number, where noted.

imprisonment, which was elevated to 240 months pursuant to USSG §§ 5G1.1(b), 1.2(b). (*Feauto* DCD 55). The sentence of 132 months of imprisonment was arrived at after the grant of a 45% reduction pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Feauto* DCD 56, 57).

On July 17, 2014, defendant Gardea was sentenced to 84 months of imprisonment, having pled guilty to conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846, and 851. (*Gardea* DCD 25, 36). At sentencing, the district court found a total offense level of 23, at criminal history category IV, for an advisory sentencing range of 70 to 87 months of imprisonment, which was elevated to 120 months pursuant to USSG § 5G1.2(b). (*Gardea* DCD 36). The sentence of 84 months of imprisonment was arrived at after the grant of a 30% reduction pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Gardea* DCD 37, 38).

On July 31, 2014, defendant Gutierrez was sentenced to 192 months of imprisonment, having pled guilty to conspiracy to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine, which contained 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 851. (*Gutierrez* DCD 23, 24, 26). At sentencing, the district court found a total offense level of 31, at criminal history category VI, for an advisory sentencing range of 188 to 235 months of imprisonment, which was elevated to 240 months pursuant to USSG § 5G1.2(b). (*Gutierrez* DCD 37). The sentence of 192 months of imprisonment was arrived at

after the grant of a 36% reduction pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Gutierrez* DCD 36, 37).

On October 15, 2010, defendant Koons was sentenced to 180 months of imprisonment, having pleaded guilty to conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 851. (*Koons* DCD 24, 55). At sentencing, the district court found a total offense level of 31, at criminal history category IV, for an advisory sentencing range of 151 to 188 months of imprisonment, which was elevated to 240 months pursuant to USSG § 5G1.1(b). (*Koons* DCD 55). The sentence of 180 months of imprisonment was arrived at after the grant of a 25% reduction pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Koons* DCD 56, 57).

On September 25, 2008, defendant Putensen was sentenced to 264 months of imprisonment, having pled guilty to conspiracy to manufacture and distribute 50 grams or more of actual methamphetamine, to distribute and possess pseudoephedrine, and to possess pseudoephedrine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(c)(1), 841(c)(2), 846, and 851. (*Putensen* DCD 14, 21). At sentencing, the district court found a total offense level of 34, at criminal history category III, for an advisory sentencing range of 188 to 235 months of imprisonment, which was elevated to mandatory life imprisonment pursuant to USSG § 5G1.1(b). (*Putensen* DCD 21). The sentence of 264 months of imprisonment was arrived at after the grant of a 35% reduction, utilizing 406 months as a life

term, pursuant to a government motion filed under 18 U.S.C. § 3553(e). (*Putensen* DCD 22, 27.1). Subsequently, while this matter has been on appeal, on January 17, 2017, Putensen's sentence was commutted to 188 months of imprisonment, conditioned upon enrollment in residential drug treatment, and he remains incarcerated at this time. (*Putensen* DCD 46).

Consideration of defendant Feauto's eligibility for a sentence reduction pursuant to retroactive guideline amendment 782 began in March 2015. An initial hearing was held on July 17, 2015, at which the district court ordered further briefing on the issue of the proper method for applying retroactive amendment 782 where a mandatory minimum and a substantial assistance departure were involved in the original sentencing. (*Feauto* DCD 69, 70). Notice was also provided to the Federal Public Defender, so the Defender could file an amicus curiae brief on the issue. A second hearing was held on October 23, 2015, at which the district court considered briefs filed by the government (*Feauto* DCD 73), defendant Feauto (*Feauto* DCD 81), and amicus counsel (*Feauto* DCD 74). Following the hearing, a tentative opinion was provided to the parties, along with amicus counsel, the Federal Public Defender. The government and amicus counsel submitted comments on November 11, 2015 (*Feauto* DCD 87, 89), and defendant Feauto submitted comments on November 12, 2015. (*Feauto* DCD 91). On November 23, 2015, the district court found that the Sentencing Commission acted outside of its authority in the manner in which it crafted and directed implementation of USSG § 1B1.10(c), and that Congress thereby violated the non-delegation doctrine and the separation

of powers principle. (*Feauto* DCD 92). Based on this finding, on November 24, 2015, the district court entered orders denying sentence reductions for defendants Gardea, Gutierrez, Koons, and Putensen. (*Gardea* DCD 48; *Gutierrez* DCD 46; *Koons* DCD 100; *Putensen* DCD 38).

Defendants challenged the denial of their sentence reductions on appeal, and the cases were consolidated by the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals affirmed the district court's denial of their eligibility for a sentence reduction, but on alternative grounds. In doing so, the Eighth Circuit analyzed the issue in accordance with that of the Tenth Circuit Court of Appeals in *United States v. C.D.*, 848 F.3d 1286 (10th Cir. 2017), and ruled that such defendants are not eligible for a reduction under 18 U.S.C. § 3582(c) because their sentences were originally based on the statutory mandatory minimum, and not "based on a sentencing range that has subsequently been lowered" by the sentencing commission.

Defendants then filed a petition for rehearing en banc or rehearing by the panel, noting that the Eighth Circuit ruling directly conflicts with the Fourth Circuit Court of Appeals ruling in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015). *Williams* held that defendants who initially had a statutory mandatory minimum above their guideline range were eligible for a sentence reduction based on a retroactive amendment to the guidelines, if they initially received a sentence below the mandatory minimum pursuant to a substantial assistance motion, and that their eligibility was due to application of Amendment 780 to the guidelines,

which had been promulgated by the Sentencing Commission to resolve a circuit split concerning proper guideline application in this context. The Eighth Circuit denied the petition for rehearing en banc and petition for rehearing by the panel.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully assert that they were wrongly denied eligibility for consideration for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline amendment 782. Petitioners assert that the Eighth Circuit erred in holding, contrary to the majority analysis of the Fourth Circuit in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015), that their sentences were not "based on a sentencing range that has subsequently been lowered by the sentencing commission pursuant to 28 U.S.C. § 994(*o*)." The holding to the contrary was error, and adds to a recent split in rulings by the Circuit Courts of Appeal concerning eligibility for defendants to receive the benefit of retroactive sentencing guideline amendments in cases where they were initially subject to a statutory mandatory minimum term of imprisonment, but received the benefit of the grant of a substantial assistance motion that permitted them to receive a lower sentence.

A. The Eighth Circuit Court of Appeals erred in holding, contrary to the opinion of the Fourth Circuit Court of Appeals, that defendants whose initial advisory guideline range was below a statutory mandatory minimum, and who were subsequently sentenced below that minimum pursuant to a reduction in sentence for substantial assistance under 18 U.S.C. § 3553(e), are not eligible for further reduction in sentence via 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline Amendment 782.

Congress authorizes the federal courts to grant sentence reductions based on retroactive sentencing guideline amendments implemented by the United States Sentencing Commission through the statutory vehicle of 18 U.S.C. § 3582(c)(2). That statute states:

> 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 . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if such reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The policy statement referenced in the statute is Guideline § 1B1.10. *See Dillon v. United States*, 560 U.S. 817, 819 (2010). The retroactive amendment process contemplates that the original sentence was based on the sentencing guideline system and a sentencing range that has subsequently been lowered by the Commission. This is why deviations from the guideline sentencing system risk removing a defendant from the reach of 18 U.S.C. § 3582(c)(2) and future retroactive guideline amendments. *See, e.g.*, *United States v. Anderson*, 686 F.3d 585, 589–90 (8th Cir. 2012) ("The statutory framework does not require the Commission to make all downward departures and variances applied to the original sentence available when creating a basis for sentencing reduction.").

In the context of these consolidated cases, however, defendants were sentenced pursuant to the sentencing guideline system and processes, and their original guideline sentencing range was inherently a sentencing factor in that determination. Their original guideline sentencing range was below a statutory

mandatory minimum. But, their guideline sentencing range then had to be elevated to a guideline sentence at the statutory mandatory minimum, pursuant to § 5G1.1 of the guidelines. The original guideline sentencing range was always part of this process as it had to be calculated and was then acted upon by operation of the mandatory minimum statute and § 5G1.1. The original sentence was, therefore, based not only on the statutory mandatory minimum, but also on a "sentencing range" promulgated by the commission.

When the commission passed and made retroactive Amendment 782, it had the effect of lowering nearly all guideline ranges for defendants sentenced pursuant to the drug quantity table. Any drug sentence where the guideline sentencing range was reduced became potentially eligible for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). However, in some cases, other statutes – here 21 U.S.C. §§ 841 and 851 – resulted in a statutory mandatory minimum higher than the amended guideline sentencing range, and barred relief for some defendants. *See, e.g., United States v. Jones*, 523 F.3d 881, 882 (8th Cir. 2008) (per curiam) (finding the defendant ineligible for § 3582(c) relief because the original guideline sentence and amended guideline sentence both remained at the statutory mandatory minimum, and were therefore unaffected by the amendment to the crack quantity guidelines).

Here, as acknowledged by the Fourth Circuit, the policy statement implementing the retroactive guideline amendment permits a district court to apply the amended guideline range, without regard to the statutory mandatory minimum

term that applied at the original sentencing, only under one specific set of circumstances. *Williams*, 808 F.3d at 261. The policy statement directs that a district court may disregard the prior application of the mandatory minimum where:

> 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 . . . .

USSG § 1B1.10(c). In this scenario, 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). *Id.* This means the statutory mandatory minimum term no longer applies in proceedings to reduce sentences pursuant to 18 U.S.C. § 3582(c)(2) under these circumstances. This is precisely the scenario applicable to the defendants in these cases, and as recognized by the Fourth Circuit in *Williams*, the defendants are eligible for a reduction in sentence. The Eighth Circuit ruling to the contrary was error.

A retroactive guideline amendment is applied after the original sentencing. And for defendants who were received the grant of a motion under 18 U.S.C. § 3553(e), the statutory mandatory minimum no longer bars eligibility for a sentence reduction under the amendment. The government's filing, and the district court's granting of a substantial assistance motion pursuant to 18 U.S.C. § 3553(e), removed the applicability of the statutory mandatory minimum. Section 3582(c)(2)

then permits a district court to apply the applicable policy statements issued by the commission to effectuate the reduction. *See Williams*, 808 F.3d at 261 (discussing how the Commission's removal of applicability of § 5G1.1 in policy statement § 1B1.10(c) thereby created eligibility for relief).

The Sentencing Commission's authority to remove applicability of § 5G1.1 in implementing a retroactive guideline range reduction stems from 28 U.S.C. § 994(u): "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Commission clarified the eligibility issue by adopting the view that, when a substantial assistance motion is filed pursuant to 18 U.S.C. § 3553(e), "[t]he government's substantial assistance motion . . . 'waived' the statutory minimum and permitted the district court to impose a lower sentence based on the appellant's applicable guideline range." *In re Sealed Case*, 722 F.3d 361, 368 (D.C. Cir. 2013) (noting that comment 23 [now 24] to USSG § 2D1.1 allows for waiver of a mandatory minimum and a lower sentence imposed where a substantial assistance motion is filed).

The Commission rejected the view that defendants in such circumstances were sentenced based on their statutory mandatory minimum sentence alone, and clarified that the correct approach under the guidelines system is to calculate a guideline range based on offense level and criminal history, prior to assessing whether a mandatory minimum applies. *Id.* at 369; *accord United States v. Savani*,

733 F.3d 56, 63 n.5 (3d Cir. 2013) ("A defendant is not assigned a new offense level or criminal history category by operation of the mandatory minimum. Rather, the guideline range that is applicable to that offense level and criminal history category is simply trumped by the mandatory minimum when the sentencing court applies step § 1B1.1(a)(8)."). The Commission clarified that the "guideline range" is the offense level and criminal history based range resulting from steps one through seven of the application instructions in USSG §1B1.1, prior to the mandatory minimum becoming the "guideline sentence" by function of law. USSG § 1B1.10, cmt. 1(A) ("[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered by an amendment . . . that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a) . . . ."); *see also Sealed Case*, 722 F.3d at 369–70 ("The mandatory minimum, in other words, *acts upon* the already determined 'applicable guideline range,' it does not *become* the guideline range."). The clarification shows that even in circumstances where a mandatory minimum term applies, the guideline sentencing system is still in operation, and the guideline sentencing range is still a sentencing factor being considered by the district court in determining the ultimate sentence to impose.

Put differently, because the statutory mandatory minimum is waived by the filing of a substantial assistance motion pursuant to 18 U.S.C. § 3553(e), the Commission removed confusion caused by § 5G1.1 in the implementation of retroactive guideline amendments. This is logical; once the statutory mandatory

minimum term is no longer applicable, it is no longer required to be the "guideline sentence" in the case. Once the statutory bar is waived by the government, 18 U.S.C. § 3582(c) permits the Sentencing Commission to issue policy statements that give district courts authority to reduce a sentence that was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *See Freeman v. United States*, 564 U.S. 522, 526 (2011) (plurality opinion) ("There is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range."); *Sealed Case*, 722 F.3d at 368 ("[W]ithout the bar of the mandatory minimum, no provision kept Amendment 750 from having 'the effect of lowering' the appellant's applicable guideline range, leaving the appellant eligible under the policy statement to pursue a sentence reduction."). The only limitation in place is the framework of USSG § 1B1.10 itself, which remains binding on the courts in this retroactive amendment process. *See Dillon* 560 U.S. at 826 (2010) (noting the "substantial role" Congress gave the Commission regarding sentence modifications, and that the Sentencing Reform Act gives the Commission the power to decide whether to amend the Guidelines, and charges it with determining whether and to what extent an amendment will be retroactive" (citing 28 U.S.C. §§ 994(o) and (u))); *see also* 28 U.S.C. § 994(n) (directing the Sentencing Commission to assure that the guidelines reflect the appropriateness of imposing a sentence below a statutory minimum when a defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense);

Williams, 808 F.3d at 262 (discussing how the policy statement applicable to these circumstances furthers the policy goal of rewarding cooperators that is reflected in both the guidelines and 18 U.S.C. § 3553(e)).

In short, the Sentencing Commission can be its own lexicographer, and has the ability to uncouple USSG § 5G1.1 from the calculus in the very limited context of cases where an 18 U.S.C. § 3553(e) motion has been granted. Notably, Congress could have rejected application in this manner by disapproving the retroactive amendment, but did not do so. Congress was aware of the Sentencing Commission's clarification of the circuit split concerning mandatory minimums and their application and role under the guidelines and the policy statement implementing the amendment, but adopted the policy of the Sentencing Commission to ensure that individuals who received substantial assistance motions from the Government would receive the benefit of retroactive sentencing guideline amendments.

The Eighth Circuit's ruling directly conflicts with the *Williams* ruling in the Fourth Circuit. The result is that defendants who received substantial assistance motions in some parts of the country are currently eligible for subsequent reductions in their sentences based on 18 U.S.C. § 3582(c)(2) and amendments to the sentencing guidelines, but those in the Eighth Circuit and Tenth Circuits are not. Given the likelihood of future retroactive amendments to the sentencing guidelines, this Court should grant the writ to correct the error, resolve this conflict in the law, and provide guidance to the Circuits that have not yet addressed this question.

B. *Freeman v. United States*, 564 U.S. 522 (2011) does not support the Eighth Circuit's holding that there is a substantive limitation on the term "based on" in 18 U.S.C. § 3582(c)(2) that prohibits defendants whose initial advisory guideline range was below a statutory mandatory minimum, and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), from being eligible for further reduction in sentence due to retroactive sentencing guideline Amendment 782.

In its decision, the Eighth Circuit stressed that Justice Sotomayor's concurring, and controlling, opinion in *Freeman* construed the term "based on" in 18 U.S.C. § 3582(c) "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 in *Williams*." *Koons*, 850 F.3d at 979. The Eighth Circuit's reliance on *Freeman* was inapposite in these cases.

Freeman concerned how Rule 11(c)(1)(C) plea agreements interact with 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline amendments, and as Justice Sotomayor's concurrence observed, "sentencing under a (C) agreement . . . is different [because] [a]t the time of sentencing, the term of imprisonment imposed pursuant to a (C) agreement does not involve the court's independent calculation of the Guidelines or consideration of the other 18 U.S.C. § 3553(a) factors." *Freeman*, 564 U.S. at 535 (Sotomayor, J., concurring). The controlling analysis in respect to (C) agreements involves examining the plea agreement itself, because (C) agreements are a mechanism for resolving cases that have the ability to operate either inside or outside the framework of the typical sentencing process. Justice

Sotomayor's concurrence stressed that the specific terms of the plea agreement must be examined in order to assess whether *the plea agreement* was "'based on' the agreed-upon sentencing range within the meaning of § 3582(c)(2)." *Id.* at 538 (emphasis added); *accord United States v. Logan*, 710 F.3d 856, 860 (8th Cir. 2013) (noting that the agreement of the parties controls the analysis in the (C) plea context).

Using this approach, Justice Sotomayor reasoned that § 3582(c)(2) relief should not be available in all Rule 11(c)(1)(C) cases, but should only be accorded in two categories of cases. First, § 3582(c)(2) relief is available in any case where the Rule 11(c)(1)(C) agreement makes clear that the applicable guidelines sentencing range was the basis for the agreed upon term of imprisonment. *Freeman*, 564 U.S. at 538–40 (Sotomayor, J., concurring). Thus, for example, when the Rule 11(c)(1)(C) agreement provides for sentencing within a specified guidelines sentencing range, and that range is subsequently lowered, relief is available to that defendant. *Id.* at 538–39 (Sotomayor, J., concurring). Second, Justice Sotomayor recognized that even agreements to specified terms of imprisonment can be based on a guideline sentencing range. Under this category, a Rule 11(c)(1)(C) agreement to a set term of incarceration still qualifies for § 3582(c)(2) relief when that agreed upon term was clearly based on a guidelines range that is subsequently lowered. *Id.* at 539 (Sotomayor, J., concurring). The controlling opinion in *Freeman* indicates that a sentence, even one agreed upon in a plea agreement, may be "based on" multiple factors, and where it was clearly "based on" a sentencing range that has

subsequently been lowered by the sentencing commission as one such factor, there is a potential for discretionary relief under § 3582(c)(2).

In the context of these cases, there is no Rule 11(c)(1)(C) agreement to examine. Defendants' sentences were determined both by operation of statutory law and the sentencing guidelines process, acting in concert. Nothing in these cases took them outside the traditional sentencing rubric and calculus contemplated by the guidelines sentencing system and corresponding statutes, as can be the case with a Rule 11(c)(1)(C) plea agreement or a sentence that contained a variance from the guidelines pursuant to the factors of 18 U.S.C. § 3553(a). The guideline range for these § 3553(e) defendants is a sentencing factor by operation of law — a factor de jure — because once the mandatory minimum has been removed from the calculus, the guideline sentencing range regains its inherent and overarching relevance as the polestar of federal sentencing. *Freeman*'s reading of the "based on" requirement was concerned only with the Rule 11(c)(1)(C) context. Different considerations are at play here. Rule 11(c)(1)(C) agreements are often designed to avoid the impact of the Guidelines. But the § 3553(e) motions in these cases put the sentencing process back on its more typical footing. The removal of USSG § 5G1.1's applicability is limited to cases where a § 3553(e) motion has been granted, and is a clarification of the guidelines, made by the Commission, to ensure an understanding that retroactive amendments do have an impact on the sentencing range in such circumstances at the time the amendment is considered. It is not an amendment to 18 U.S.C. § 3582(c)(2) itself.

The Eighth Circuit's ruling that the ultimate sentence in these cases was not "based on" anything more than the statutory mandatory minimum and defendants' substantial assistance reductions over-extends the analysis in *Freeman*. This invites the Court to clarify and resolve the tension between the plurality opinions in *Freeman* — whether the guideline sentencing range is a substantive factor that is always involved in determining the ultimate sentence, or whether it can become immaterial due to operation of law or other determinations made by the sentencing court.

CONCLUSION

For the foregoing reasons, Petitioners Timothy D. Koons, Kenneth Jay Putensen, Randy Feauto, Esequiel Gutierrez, and Jose Manuel Gardea, respectfully request that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX

Decision of the Eighth Circuit Court of Appeals, March 10, 2017

Eighth Circuit Court of Appeals Order Denying Petition for Rehearing or Rehearing En Banc, May 25, 2017

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.

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[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.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-3794

United States of America

Plaintiff - Appellee

v.

Timothy D. Koons

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City
(5:10-cr-04031-MWB-2)

JUDGMENT

Before WOLLMAN, LOKEN and BENTON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 10, 2017

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-3794

United States of America

Appellee

v.

Timothy D. Koons

Appellant

No: 15-3825

United States of America

Appellee

v.

Kenneth Jay Putensen

Appellant

No: 15-3854

United States of America

Appellee

v.

Randy Feauto

Appellant

No: 15-3880

United States of America

Appellee

v.

Esequiel Gutierrez

Appellant

No: 15-3894

United States of America

Appellee

v.

Jose Manuel Gardea

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City
(5:10-cr-04031-MWB-2)
(3:07-cr-03008-MWB-1)
(3:12-cr-03046-MWB-1)
(5:14-cr-04016-MWB-1)
(5:14-cr-04017-MWB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

May 25, 2017

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

/s/ Michael E. Gans