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

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
CHRISTOPHER G. MICHEL
Assistants to the Solicitor General
DEMETRA LAMBROS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioners pleaded guilty to drug offenses that carried statutory minimum sentences higher than advisory ranges calculated by reference to Sentencing Guidelines § 2D1.1. The district court granted each petitioner a departure below the statutory minimum "to reflect [his] substantial assistance" to law enforcement. 18 U.S.C. 3553(e). The recommended ranges under Sentencing Guidelines § 2D1.1 were later decreased retroactively, but the statutory minimums were not.

The question presented is whether petitioners were "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," so as to be eligible for postjudgment sentence reductions under 18 U.S.C. 3582(c)(2).

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, guidelines, and rules: Page

Statutes, guidelines, and rules—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 17-5716

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

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 44-56) is reported at 850 F.3d 973. The opinion of the district court (J.A. 57-95) is reported at 146 F. Supp. 3d 1022.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017. A petition for rehearing was denied on May 25, 2017 (J.A. 98-100). The petition for a writ of certiorari was filed on August 22, 2017, and granted on December 8, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Pertinent statutes and United States Sentencing Guidelines provisions are reprinted in an appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

Following guilty pleas in the United States District Court for the Northern District of Iowa, petitioners were convicted in separate criminal cases of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and other offenses. The district court sentenced petitioner Koons to 180 months of imprisonment, petitioner Putensen to 264 months of imprisonment, petitioner Feauto to 132 months of imprisonment, petitioner Gutierrez to 192 months of imprisonment, and petitioner Gardea to 84 months of imprisonment. J.A. 116, 154, 177, 198, 216-219. The sentences included subsequent terms of ten years of supervised release for petitioners Koons, Putensen, Feauto, and Gutierrez, and eight years of supervised release for petitioner Gardea. J.A. 118, 154, 178, 199, 218. The district court later determined that postjudgment amendments to the advisory Sentencing Guidelines did not render petitioners eligible for sentence reductions under 18 U.S.C. 3582(c)(2). J.A. 57-97. The court of appeals affirmed. J.A. 52-56.

A. Initial Proceedings

Although petitioners' individual circumstances differ, their initial proceedings unfolded in substantially similar ways. In each case, the parties entered into a plea agreement that evidenced an understanding that a statutory minimum penalty would apply. In each case, the Probation Office informed the district court that the statutory minimum penalty was also the appropriate sentence under the Sentencing Guidelines, because the Guidelines would otherwise have recommended a sentence below that statutory minimum. In each case, the government moved for a departure below the statutory minimum to reflect petitioners' substantial assistance

to law enforcement. And in each case, the court imposed a sentence that it calculated as a departure from the sentence that it would otherwise have imposed—namely, the statutory minimum or an upward variance therefrom. In no case did the court reference any guidelines range below the statutory minimum in determining the extent of that departure.

Table 1: Summary of Petitioners' Sentences

	Initial Guidelines Calculation	**Statutory Minimum**	**Substantial Assistance Departure**	**Sentence**
Koons	151-188 months	240 months	25%	180 months (240 - 25%)
Putensen	188-235 months	Life in Prison (406 months)	35%	264 months (406 - 35%)
Feauto	168-210 months	240 months	45%	132 months (240 - 45%)
Gutierrez	188-235 months	240 months (before 60-month upward variance)	108 months	192 months (240 + 60 - 108)
Gardea	70-87 months	120 months	30%	84 months (120 - 30%)

1. At various points between 2008 and 2014, petitioners each pleaded guilty to one or more drug-trafficking offenses that carried a statutory minimum sentence under 21 U.S.C. 841(b)(1). Section 841(b)(1) creates a tiered scheme of minimum sentences, the lengths of which are dictated by, *inter alia*, the type and quantity

of drugs involved in the offense and the criminal history of the offender. See *ibid.*; see also 21 U.S.C. 846 (conspiracy to traffic drugs "subject to the same penalties" as substantive drug trafficking). Each petitioner expressly acknowledged in his plea agreement that his offense was "punishable by a mandatory minimum sentence." Supp. J.A. 2, 22, 66, 92, 118.

Petitioner Koons pleaded guilty to conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1). Supp. J.A. 8, 10. He acknowledged that he had a prior felony drug conviction and that his offense carried a statutory minimum sentence of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A). Supp. J.A. 2.

Petitioner Putensen pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of methamphetamine, to distribute and possess pseudoephedrine, and to possess pseudoephedrine with the intent to manufacture methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. Supp. J.A. 28-29. He acknowledged that he had two prior felony drug convictions and that his offense carried a statutory minimum sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A). Supp. J.A. 21-22.

Petitioner Feauto pleaded guilty to conspiracy to manufacture and distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and to unlawful possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). Supp. J.A. 102-104. He acknowledged that he had a prior felony drug conviction and that his drug offense

carried a statutory minimum sentence of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A). Supp. J.A. 92.

Petitioner Gutierrez pleaded guilty to conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. Supp. J.A. 71-72. He acknowledged that he had a prior felony drug conviction and that his offense carried a statutory minimum sentence of 20 years of imprisonment under 21 U.S.C. 841(b)(1)(A). Supp. J.A. 66.

Petitioner Gardea pleaded guilty to conspiracy to distribute five grams or more of actual methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. Supp. J.A. 123-124. He acknowledged that he had a prior felony drug conviction and that his offense carried a statutory minimum sentence of ten years of imprisonment under 21 U.S.C. 841(b)(1)(B). Supp. J.A. 118.

2. After each petitioner's guilty plea, the Probation Office prepared a presentence investigation report that applied the advisory Sentencing Guidelines (which, except where noted, were identical at all relevant times). See 18 U.S.C. 3552(a). Each report stated that the appropriate sentence under the Guidelines was the statutory minimum for the relevant drug offense.

For each petitioner, the Probation Office calculated an initial range of sentences without reference to the statutory minimum, by determining the base offense level under the default guidelines for drug offenses, Sentencing Guidelines § 2D1.1; applying various adjustments (*e.g.*, a downward adjustment for acceptance of responsibility, *id.* § 3E1.1); and cross-referencing the resulting offense level with each petitioner's criminal history, *id.* § 1B1.1(a)(7). See *Dorsey* v. *United States*, 567 U.S. 260, 266-267 (2012) (explaining guidelines calculation in typical drug case). But each time, the result

of that initial calculation was below the statutory minimum dictated by 21 U.S.C. 841(b)(1). The Probation Office therefore determined the ultimate recommended guidelines sentence in each case by applying 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."

For petitioner Koons, the Probation Office computed a base offense level of 34 under the default drug guidelines, decreased that by three levels for acceptance of responsibility, and combined his offense level with his criminal history category of IV for an initial range of 151 to 188 months of imprisonment. Supp. J.A. 15-17. Because that range fell entirely below the statutory minimum sentence of 20 years of imprisonment, the Probation Office reported a "guideline range" of 240 months. *Id.* at 16-17.

For petitioner Putensen, the Probation Office computed a base offense level of 34 under the default drug guidelines, applied offsetting adjustments (for his managerial role and acceptance of responsibility) with no net effect on the offense level, and combined his offense level with his criminal history category of III for an initial range of 188 to 235 months of imprisonment. Supp. J.A. 39-41. Because that range fell entirely below the statutory minimum sentence of life imprisonment, the Probation Office reported a "guideline range" of life imprisonment. *Id.* at 41.

For petitioner Feauto, the Probation Office computed a base offense level of 32 under the default drug guidelines, applied a net increase of one level (for his use of a firearm, obstruction of justice, and acceptance

of responsibility), and combined his offense level with his criminal history category of III for an initial range of 168 to 210 months of imprisonment. Supp. J.A. 111-113. Because that range fell entirely below the statutory minimum sentence of 20 years of imprisonment, the Probation Office reported a "guideline term" of 240 months. *Id.* at 113.

For petitioner Gutierrez, the Probation Office computed a base offense level of 32 under the default drug guidelines, applied a net decrease of one level (for his use of a firearm and acceptance of responsibility), and combined his offense level with his criminal history category of VI for an initial range of 188 to 235 months of imprisonment. Supp. J.A. 74-76. Because that range fell entirely below the statutory minimum sentence of 20 years of imprisonment, the Probation Office reported a "guideline term" of 240 months. *Id.* at 76.

For petitioner Gardea, the Probation Office computed a base offense level of 26 under the default drug guidelines, decreased that by three levels for acceptance of responsibility, and combined his offense level with his criminal history category of IV for an initial range of 70 to 87 months of imprisonment. Supp. J.A. 126-128. Because that range fell entirely below the statutory minimum sentence of ten years of imprisonment, the Probation Office reported a "guideline term" of 120 months. *Id.* at 128.

3. At each petitioner's sentencing hearing, the government moved for a departure from the statutory minimum sentence under 18 U.S.C. 3553(e). A Section 3553(e) motion allows a court to "impose a sentence below" a statutory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

Ibid. Section 3553(e) further provides that "[s]uch sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission." *Ibid.*

The government also moved for departures from petitioners' guideline sentences under Sentencing Guidelines § 5K1.1, which similarly provides that a court "may depart from the guidelines" upon "motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 5K1.1 specifies a set of nonexclusive factors that the district court should consider in determining the extent of any substantial-assistance departure under either Section 3553(e) or Section 5K1.1, such as the "significance and usefulness of the defendant's assistance," "any danger or risk of injury to the defendant or his family resulting from his assistance," and the "timeliness of the defendant's assistance." *Id.* § 5K1.1(a); see *id.* § 5K1.1, comment. (n.1); *Melendez* v. *United States*, 518 U.S. 120, 129-130 & n.10 (1996).

For each petitioner, the district court granted a substantial-assistance departure, which it calculated as a reduction from the statutory minimum (or, in petitioner Gutierrez's case, a reduction from a variance upward from the statutory minimum). As the court explained—and as precedent of the Eighth Circuit and every other court of appeals to address the issue required—the district court based its substantial-assistance reduction on considerations related to petitioners' substantial assistance, such as those outlined in Sentencing Guidelines § 5K1.1, not on other factors. See *United States* v. *Billue*, 576 F.3d 898, 902-905 (8th Cir.), cert. denied, 558 U.S. 1058 (2009); see also *United States* v. *Spinks*,

770 F.3d 285, 287-288 & n.1 (4th Cir. 2014) (collecting cases). At no point in any of the five sentencing proceedings did the court rely on the default drug guidelines to determine either the starting point of the substantial-assistance departure or the extent of that departure.

At petitioner Koons' sentencing, the district court agreed with the Probation Office's calculations and recognized that the statutory minimum of 240 months "trump[ed] the advisory guideline range." J.A. 104; see J.A. 114-115. In response to the government's motion for a substantial-assistance departure, the court considered his assistance to law enforcement, including his testimony before a grand jury and provision of timely information that helped the government to obtain a search warrant. J.A. 107-116. Relying on the factors outlined in Section 5K1.1, the court determined that his assistance warranted a 25% departure from the 240-month statutory minimum. J.A. 114-116. The court accordingly sentenced him to 180 months of imprisonment. J.A. 116.

At petitioner Putensen's sentencing, the district court agreed with the Probation Office's calculations and recognized that "the guideline provision is a mandatory life sentence" as a result of the statutory minimum. J.A. 158; see J.A. 174. In response to the government's motion for a substantial-assistance departure, the court considered his assistance to law enforcement, including his testimony before a grand jury and the detailed information he had provided about methamphetamine-production operations. J.A. 159-163, 174-175. Relying on the factors outlined in Section 5K1.1, the court determined that his assistance warranted a

35% departure from the statutory minimum of life imprisonment, which the court treated as a sentence of 406 months for purposes of that calculation. J.A. 167-168, 174-177. The court accordingly sentenced him to 264 months of imprisonment. J.A. 177.

At petitioner Feauto's sentencing, the district court agreed with the Probation Office's calculations and recognized that the statutory minimum of 240 months "trump[ed] the advisory guideline range." J.A. 126. In response to the government's motion for a substantial-assistance departure, the court considered his assistance to law enforcement, including his participation in several controlled transactions that led to the indictment of at least four criminal defendants. J.A. 127-133, 148-149. Relying on the factors outlined in Section 5K1.1, the court determined that his assistance warranted a 45% departure from the 240-month statutory minimum. J.A. 126, 153. The court accordingly sentenced him to 132 months of imprisonment. J.A. 154.

At petitioner Gutierrez's sentencing, the district court agreed with the Probation Office's calculations and recognized that "the advisory guideline range becomes the mandatory minimum of 240" months. J.A. 203. The court determined, however, that such a sentence did not adequately account for the quantity of methamphetamine he had admitted to distributing or the numerous home-invasion robberies he had committed. J.A. 204-214; see Supp. J.A. 81-90. The court accordingly decided to vary upward "from the mandatory minimum of 240 months" and determined that the appropriate sentence without a substantial-assistance departure would be 300 months. J.A. 218. The court considered his assistance in a sealed portion of the hearing,

see Supp. J.A. 81-90, and determined to "depart downward from 300 months down to 192 months" of imprisonment, J.A. 216; see J.A. 216-219.

At petitioner Gardea's sentencing, the district court agreed with the Probation Office's calculations and recognized that the "advisory guideline range [was] trumped by the mandatory minimum" of 120 months. J.A. 197; see J.A. 185. In response to the government's motion for a substantial-assistance departure, the court considered his assistance to law enforcement, including his testimony before a grand jury. J.A. 196-198. Relying on the factors outlined in Section 5K1.1, the court determined that his assistance warranted a 30% departure below the 120-month statutory minimum. J.A. 197-198. The court accordingly sentenced him to 84 months of imprisonment. J.A. 198.

B. Sentence Reduction Proceedings

1. In November 2014, the Sentencing Commission adopted Amendment 782 to the Sentencing Guidelines, which lowered the base offense levels in the default drug guidelines, Sentencing Guidelines § 2D1.1, by two levels for offenses involving certain drug quantities. See Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014); see 28 U.S.C. 994(*o*) (authorizing amendments). The Commission made Amendment 782 retroactive. Sentencing Guidelines App. C Supp., Amend. 788 (Nov. 1, 2014); see 28 U.S.C. 994(u) (authorizing retroactive amendments). Under Amendment 782, the default drug-guidelines calculations in petitioners' cases resulted in ranges even further below the relevant statutory minimums, which remained unchanged. J.A. 49.

2. After Amendment 782 was promulgated, the district court *sua sponte* directed petitioners and the government to address whether petitioners were eligible

for sentence reductions under 18 U.S.C. 3582(c)(2). See J.A. 61-62 n.3. Section 3582(c)(2) authorizes a district court to reduce the previously imposed 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." 18 U.S.C. 3582(c)(2). In such a case, "the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

Petitioners and the government both took the position that petitioners were eligible for sentence reductions under Section 3582(c)(2). The parties relied on the 2014 addition of subsection (c) to the policy statement applicable to sentence reductions, Sentencing Guidelines § 1B1.10. Section 1B1.10(c) states that "[i]f 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." *Ibid.* As noted above, Sentencing Guidelines § 5G1.1(b) provides that a statutory minimum "shall be the guideline sentence" when it exceeds the otherwise-applicable guidelines range. Thus, under Sentencing Guidelines § 1B1.10(c), petitioner Feauto's "amended guideline range," for example, would be calculated without regard to the still-extant 240-month statutory minimum and would thus be lower than the 240-month

"guideline sentence" that Section 5G1.1(b) had dictated at his sentencing. See J.A. 57-59, 70.

After a hearing, as well as additional briefing from federal public defender offices, the district court issued an order in petitioner Feauto's case "disagree[ing] with the parties' argument that the Sentencing Commission has the authority to use Amendment 782, or any other amendment to the Sentencing Guidelines, to 'nullify' a mandatory minimum sentence established by Congress." J.A. 60. The court noted that its determination came "with significant irony" because the court had "consistently" and "vehemently" disagreed with most statutory minimum sentences on policy grounds. J.A. 59-60 & n.2.

The district court explained that "a defendant whose mandatory minimum exceeded his guideline range was not a defendant sentenced pursuant to a guideline range, but a defendant sentenced pursuant to a mandatory minimum and a statutorily-permissible reduction from the mandatory minimum for substantial assistance." J.A. 86. The court observed that the "limited authority provided in the first sentence of § 3553(e) is only to 'impose a sentence below a level established by statute as a minimum sentence *so as to reflect a defendant's substantial assistance*.'" J.A. 79 (quoting 18 U.S.C. 3553(e)) (emphasis added by court). The court cited circuit precedent "emphasizing that, in ruling on the prosecution's downward departure motion based on substantial assistance, a court may consider only factors related to a defendant's substantial assistance." *Ibid.* (citing *Billue*, 576 F.3d at 902-904). And the court stressed that "Amendment 782 is *not* an amendment to the 'substantial assistance' guidelines." J.A. 77-78.

The district court additionally observed that permitting a sentence reduction for defendants like petitioners would produce "pernicious consequences" and "create[] the very kind of unwarranted disparity the guidelines were intended to avoid." J.A. 61, 86. The court explained that "a defendant being sentenced for the first time under Amendment 782" would be subject to the "mandatory minimum sentence as a 'starting point' for any substantial assistance reduction," J.A. 87 (emphasis omitted), and it noted that petitioner Feauto in particular would "receive the identical sentence" in that circumstance, J.A. 89. It contrasted such continued application of statutory minimums to current and future defendants with lower sentences such as those petitioners were seeking, which would constitute "a second reduction for substantial assistance," this time "without regard to that defendant's statutory mandatory minimum sentence." J.A. 87 (emphasis omitted). The court also noted "another anomaly" with deeming defendants like petitioners eligible for reductions, in that even though Amendment 782 was designed "to ameliorate the harshness of the drug guidelines, not to reward cooperators twice" for their cooperation, the only defendants subject to statutory minimum drug sentences who would be eligible for Section 3582(c)(2) reductions under the parties' position would be cooperators. J.A. 88-89.

The district court subsequently issued a brief order denying sentence reductions to petitioners Koons, Putensen, Gutierrez, and Gardea. J.A. 96-97. While petitioners' appeal was pending, President Obama granted petitioner Putensen's request for clemency, reducing his sentence from 264 months to 188 months. See Supp. J.A. 49-50.

3. On appeal, the government maintained its view that petitioners were eligible for sentence reductions under Section 3582(c)(2) and requested a remand. Gov't C.A. Br. 6-7. The court of appeals affirmed. J.A. 44-56.

The court of appeals determined 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." J.A. 49 (quoting 18 U.S.C. 3582(c)(2)). The court explained that each petitioner's sentence was instead "'based on' his statutory mandatory minimum sentence and his substantial assistance." J.A. 52. The court observed that in *Freeman* v. *United States*, 564 U.S. 522 (2011), "all nine Justices construed the term 'based on' as imposing a substantive limitation on § 3582(c)(2)" eligibility that was "inconsistent" with a reduction in petitioners' sentences. J.A. 55.

The court of appeals explained 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." J.A. 52. The court observed that even if Sentencing Guidelines § 5G1.1(b) "did not exist, the district court would still have set [petitioners'] sentences at the mandatory minimum before considering a substantial assistance departure" and that "if initially sentenced today with Amendment 782 in effect, [petitioners] would be 'stuck with that mandatory minimum sentence as a "starting point" for any substantial assistance reduction.'" *Ibid.* (citation omitted). The court additionally explained that Section 3553(e) requires "[a]ny 'reduction below the statutory minimum'" to be "'based exclusively on assistance-

related considerations.'" *Ibid.* (quoting *United States* v. *Williams*, 474 F.3d 1130, 1131 (8th Cir. 2007)). "In essence," the court observed, "the advisory sentencing range became irrelevant." *Ibid.* (citation omitted).

4. As noted at the certiorari stage of this case (Br. in Opp. 11), the government has reconsidered its position and now agrees with the court of appeals' decision in this case and with the Tenth Circuit's similar holding in *United States* v. *C.D.*, 848 F.3d 1286 (2017), petition for cert. pending, No. 16-9672 (filed June 20, 2017).

SUMMARY OF ARGUMENT

The lower courts correctly determined that petitioners are 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," 18 U.S.C. 3582(c)(2). Petitioners' sentences did not depend in any way upon the default drug guidelines that the Commission modified in Amendment 782, which dropped out of their sentencing proceedings once it became clear that relying on them would produce a sentence below the statutory minimum. The law did not allow the district court to reintroduce those guidelines when considering petitioners' substantial-assistance departures, and the court did not do so. Petitioners are not entitled to windfall relief that would produce sentences shorter than those they would receive if sentenced for the first time today.

As a threshold matter, petitioners are not eligible for sentence reductions under Section 3582(c)(2) because their "sentencing range[s]" were statutory minimums that the Commission did not and cannot "lower[]." 18 U.S.C. 3582(c)(2). The Commission-modifiable "sentencing range" referenced in Section 3582(c)(2) is most naturally understood as the Commission-recommended

"sentencing range" that 18 U.S.C. 3553(a)(4) requires a district court to consider when imposing a sentence. The Guidelines contain specific instructions for the calculation of that "sentencing range," and in a case in which it would otherwise fall below a statutory minimum, the "sentencing range" is set at the statutory minimum. See Sentencing Guidelines §§ 1B1.1(a), 5G1.1(b). The filing of a motion for a substantial-assistance departure under 18 U.S.C. 3553(e) or Sentencing Guidelines § 5K1.1 does not affect the determination of the numerical "sentencing range," but instead only allows a departure below it.

Even if the term "sentencing range" were construed more broadly, petitioners' sentencing ranges would still not be "based on" the default drug guidelines modified in Amendment 782. Guidelines that would apply in the absence of a superseding statutory minimum have no role in the sentencing of a cooperator under 18 U.S.C. 3553(e). In stark contrast to the neighboring subsection (18 U.S.C. 3553(f)), Section 3553(e) expressly ties the authority to grant a substantial-assistance departure to the sentence "established by statute as a minimum sentence"; it expressly limits the extent of the departure to the degree that "reflect[s] a defendant's substantial assistance"; and the policy statement implementing it does not allow for consideration of factors unrelated to substantial assistance. 18 U.S.C. 3553(e); see Sentencing Guidelines § 5K1.1. Thus, as every court of appeals to address the question has recognized, a Section 3553(e) departure is a departure *from the statutory minimum* that "must be based *exclusively* on assistance-related considerations," not on any other considerations embodied in the Guidelines. J.A. 52 (emphasis added; citation omitted); see, *e.g.*, *United States* v.

Spinks, 770 F.3d 285, 287-288 & n.1 (4th Cir. 2014) (collecting cases). The district court here accordingly did not consider the default drug guidelines in granting petitioners' substantial-assistance departures, and none of the interpretations of "based on" in the separate opinions in *Freeman* v. *United States*, 564 U.S. 522 (2011), would suggest that a modification of those guidelines renders petitioners eligible for sentence reductions.

Although the Commission's policy statement for Section 3582(c)(2) sentence reductions, Sentencing Guidelines § 1B1.10, anticipates that defendants in petitioners' situation will be eligible for reductions, the policy statement alone cannot authorize such reductions. As neither a legal nor a practical matter does the Commission have the ability to construe a previously imposed sentence as "based on" a guideline when in fact it was not. Granting sentence reductions to petitioners would also create the very sort of sentencing disparities that Section 3582(c)(2) is designed to eliminate. Among other things, it would anomalously put petitioners in a better position for having been sentenced *before* the Commission lowered the drug guidelines, by allowing them to serve lower sentences than an identically situated current or future defendant.

ARGUMENT

THE STATUTORY MINIMUM SENTENCES FOR PETITIONERS' OFFENSES PRECLUDE THEM FROM SEEKING SENTENCE REDUCTIONS UNDER 18 U.S.C. 3582(c)(2)

The general rule that a federal court may not "'modify a term of imprisonment once it has been imposed'" contains a "narrow exception[]" in 18 U.S.C. 3582(c)(2) for "'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.'" *Freeman* v. *United States*, 564 U.S. 522, 526-527 (2011) (plurality opinion) (quoting 18 U.S.C. 3582(c) and (2)). That narrow exception does not encompass a circumstance in which the Commission has lowered a "range" that was already lower than the statutory minimum for the defendant's crime. Neither a sentence at the statutory minimum, nor a departure below that level calibrated solely as a reward for "substantial assistance" to law enforcement, 18 U.S.C. 3553(e), can be considered to have been "based on" any "sentencing range" that the Commission has lowered, 18 U.S.C. 3582(c)(2). Petitioners' contrary view of sentencing law is at odds with the procedures required and followed in their own cases. And it would introduce the very sort of timing-based disparity that Section 3582(c)(2) is designed to eliminate, by allowing their sentences to be reduced to a level below what they would receive if sentenced for the first time today.

A. The "Sentencing Ranges" For Petitioners' Offenses Were Statutory Minimums That The Commission Cannot "Lower"

Petitioners are ineligible for sentence reductions under Section 3582(c)(2) because their "sentencing range[s]" were not a function of the default drug guidelines that the Commission subsequently lowered in Amendment 782. 18 U.S.C. 3582(c)(2). Their "sentencing ranges" were instead the statutory minimum sentences required by 21 U.S.C. 841(b)(1).

1. Congress enacted Section 3582(c)(2) as part of the Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, Tit. II, ch. II, §§ 212(a), 217(a), 98 Stat. 1987-1992, 2017-2026 (18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991 *et seq.*), which also created the Sentencing Commission. See

Mistretta v. *United States*, 488 U.S. 361, 367-368 (1989). The Act directs the Commission to "promulgate Sentencing Guidelines and to issue policy statements regarding the Guidelines' application." *Dillon* v. *United States*, 560 U.S. 817, 820 (2010); see 28 U.S.C. 994(a). Those guidelines and policy statements provide two of the factors that 18 U.S.C. 3553(a) requires a district court to consider at sentencing. See 18 U.S.C. 3553(a)(4) and (5); see also, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 49-50 & n.6 (2007). Specifically, under Section 3553(a)(4), the sentencing court must consider "the sentencing range established" by the Commission for "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines," and under Section 3553(a)(5), the sentencing court must consider "any pertinent policy statement * * * issued by the Sentencing Commission." 18 U.S.C. 3553(a)(4)(A) and (5)(A). Since *United States* v. *Booker*, 543 U.S. 220 (2005), the guidelines and policy statements have been "effectively advisory," rather than mandatory, when consulted for those purposes. *Pepper* v. *United States*, 562 U.S. 476, 490 (2011) (citation omitted).

The Sentencing Reform Act "also charged the Commission with periodically reviewing and revising the Guidelines." *Dillon*, 560 U.S. at 820; see 28 U.S.C. 994(*o*). When the Commission amends the Guidelines in a manner that would result in lower advisory sentences for a particular offense, "the Commission must determine 'in what circumstances and by what amount the sentences of prisoners'" who are already "'serving terms of imprisonment for the offense may be [retroactively] reduced.'" *Dillon*, 560 U.S. at 820 (quoting 28 U.S.C. 994(u)). To the extent that the Commission chooses to make its amendment retroactive, Section 3582(c)(2)

then allows a district court to "reduce the term of imprisonment * * * consistent with applicable policy statements issued by the Sentencing Commission," for a defendant "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." See *id.* at 824-825 (citation omitted).

2. In petitioners' cases, the "sentencing range" for purposes of Section 3582(c)(2) was the statutory minimum under 21 U.S.C. 841(b)(1)—not any range calculated based on the drug guidelines that the Commission later amended.

The term "sentencing range" appears in three places in the Sentencing Reform Act: (1) in 28 U.S.C. 994(b)(1), which directs that "the guidelines promulgated" by the Commission must "establish a sentencing range that is consistent with all pertinent provisions of" the federal criminal code; (2) in 18 U.S.C. 3553(a)(4)(A), which instructs a court to consider "the sentencing range established" by the Commission for "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines" in "determining the particular sentence to be imposed"; and (3) in 18 U.S.C. 3582(c)(2), which authorizes a postjudgment sentence reduction for a defendant whose sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

Under ordinary principles of statutory interpretation, "'identical words used in different parts of the same statute' carry 'the same meaning.'" *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (quoting *IBP, Inc.* v. A*lvarez*, 546 U.S. 21, 34 (2005)). The inference of common meaning is particularly strong when Congress enacted the same words in

the same statute at the same time. See, *e.g.*, *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 570-571 (2012). Thus, the "sentencing range" that a defendant's sentence must be "based on" for purposes of Section 3582(c)(2) is the same "sentencing range established" by the Guidelines, 18 U.S.C. 3553(a)(4), which must, in turn, be "consistent with all pertinent provisions of" federal criminal law, 28 U.S.C. 994(b)(1), including statutory minimum sentences, 21 U.S.C. 841(b)(1)(A) and (B). A contrary interpretation—under which the "sentencing range" for purposes of Section 3582(c)(2) would not be required to be consistent with the relevant statutes, or would be different from the one that the district court considered at sentencing—would make little sense.

When a defendant's guidelines calculation would otherwise produce a range below the statutory minimum for his offense, that statutory minimum *is* his "sentencing range" under the Sentencing Reform Act. The "sentencing range" that the district court is required to consider under 18 U.S.C. 3553(a)(4) is determined by an algorithm set forth in Sentencing Guidelines § 1B1.1(a). See *ibid.* (specifying how the "court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4))"). As petitioners observe (Br. 21), Section 1B1.1(a) of the Guidelines directs district courts to follow eight steps, in a specific sequence, to determine a defendant's "guideline range." The first five steps produce the defendant's "offense level" by applying the base offense level that corresponds to the offense of conviction and adjusting that level upward or downward to account for certain factors relating to the offender and the offense, such as a managerial role or acceptance of responsibility. Sentencing Guidelines § 1B1.1(a)(1)-(5). At the sixth step, the court

calculates the defendant's criminal history category. *Id.* § 1B1.1(a)(6). The seventh step directs the court to determine "the guideline range * * * that corresponds to the offense level and criminal history category" in the sentencing table in the Commission's Guidelines Manual. *Id.* § 1B1.1(a)(7).

The eighth and final step ensures that a statutory minimum will override any potential lower guidelines range, such that the "sentencing range" the court considers under Section 3553(a)(4) accords with statutory law. See 28 U.S.C. 994(b)(1). That step requires the court to determine whether any other "sentencing requirements" affect the calculated range. Sentencing Guidelines § 1B1.1(a)(8). It expressly directs a court to consult, *inter alia*, "Part * * * G of Chapter Five." *Ibid.* That Part includes Section 5G1.1, which explains the process to follow if the calculation after the first seven steps conflicts with a statutory requirement. Cf. *Neal* v. *United States*, 516 U.S. 284, 294 (1996) (recognizing that Section 5G1.1 reflects the Commission's understanding that a "statute controls" if it "conflict[s]" with "the Guidelines calculation"). Specifically, Section 5G1.1(b) directs 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." Sentencing Guidelines § 5G1.1(b) (emphasis added).

The presentence reports in petitioners' cases illustrate the relevant determination. In each case, the Probation Office calculated an initial guidelines range that looked to Sentencing Guidelines § 2D1.1—the default drug guidelines that Amendment 782 later modified—for the base offense level. Supp. J.A. 16-17, 39-41, 74-

76, 111-113, 126-128. But because that calculation resulted in a range below the applicable statutory minimum, each report recognized that the ultimate "guideline range" or "guideline term" would be the statutory minimum. See *id.* at 17 ("[B]ecause of the statutory mandatory minimum, the guideline range for imprisonment becomes 240 months."); *id.* at 41 ("[B]ecause of the statutory mandatory minimum, the guideline range for imprisonment becomes life."); *id.* at 76 ("[T]he statutorily required minimum sentence of 20 years is greater than the maximum of the applicable guideline range; therefore, the guideline term of imprisonment is 240 months."); *id.* at 113 ("[T]he statutorily authorized minimum sentence is greater than the maximum of the applicable guideline range; therefore, the guideline term of imprisonment is 240 months."); *id.* at 128 ("[T]he statutorily required minimum sentence of 10 years is greater than the maximum of the applicable guideline range; therefore, the guideline term of imprisonment is 120 months."). Thus, in determining petitioners' sentencing ranges, the statutory minimum sentences "trump[ed]" the otherwise-applicable guidelines. *Dorsey* v. *United States*, 567 U.S. 260, 266 (2012).

3. The government's motions for substantial-assistance departures under 18 U.S.C. 3553(e) and Sentencing Guidelines § 5K1.1 did not change the "sentencing range[s]" in petitioners' cases. 18 U.S.C. 3582(c)(2). Notwithstanding those motions, the "sentencing range" for each petitioner remained the statutory minimum, not a range calculated from the drug guidelines.

Section 3553(e) provides that "[u]pon 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." 18 U.S.C. 3553(e). It further provides that "[s]uch 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). But it does not refer to, or purport to allow modification of, a defendant's "sentencing range."

Nor does Sentencing Guidelines § 5K1.1, the policy statement that both guides substantial-assistance departures under Section 3553(e) and authorizes substantial-assistance departures in the context of the Guidelines themselves. Under 28 U.S.C. 994(n), the Commission is required to "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." Section 5K1.1 complies with that directive by providing that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." Sentencing Guidelines § 5K1.1. The policy statement's instructions for how "[t]he appropriate reduction shall be determined" are applicable to both a motion under Section 5K1.1 itself and the separate motion that the government must file under Section 3553(e) to authorize a substantial-assistance departure below the statutory minimum. *Id.* § 5K1.1(a); see *id.*

§ 5K1.1, comment. (n.1); *Melendez* v. *United States*, 518 U.S. 120, 129-130 & n.10 (1996).

The Guidelines Manual does not treat consideration of the substantial-assistance factors outlined in Section 5K1.1 as part of the "sentencing range" to be computed for purposes of 18 U.S.C. 3553(a)(4). Section 5K1.1(a) enumerates a nonexhaustive set of "reasons" that may inform a substantial-assistance departure in a particular defendant's case. Sentencing Guidelines § 5K1.1(a). The determinations contemplated by Section 5K1.1 do not involve adding to or subtracting from a defendant's offense level or criminal history category; they require non-numerical considerations particularized to a specific defendant, and are thus not germane to the "sentencing range" for a "category of offense committed by" a "category of defendant" under 18 U.S.C. 3553(a)(4)(A).

Section 5K1.1's application is accordingly not one of the eight steps for calculating the numerical "range" under Sentencing Guidelines § 1B1.1(a) for purposes of Section 3553(a)(4). Cf. *Peugh* v. *United States*, 569 U.S. 530, 535 (2013) (describing guidelines as "yield[ing] a predetermined * * * range of months"). Instead, the Guidelines instruct that *after* calculating the numerical range for purposes of Section 3553(a)(4), the "court shall *then* consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5)." Sentencing Guidelines § 1B1.1(b) (first emphasis added). That instruction cites 18 U.S.C. 3553(a)(5), which requires a sentencing court to consider—as a sentencing factor *separate* from the "sentencing range" under Section 3553(a)(4)—"any pertinent policy statement" promulgated by the

Commission. Thus, even in a case involving a substantial-assistance departure, the "sentencing range" remains the same. And in a case like petitioners'—where the otherwise-applicable guidelines calculation would produce a sentence below the statutory minimum—Sentencing Guidelines § 5G1.1(b) sets the "sentencing range" at the statutory minimum.

Contrary to petitioners' contention (Br. 26), that would remain true even if a motion under Section 3553(e) allowed the district court to impose a sentence below the statutory minimum for any reason, rather than just for reasons related to the defendant's substantial assistance. But see Part B.1, *infra* (explaining that only substantial-assistance considerations are permissible). Although petitioners rely on that interpretation of Section 3553(e) to argue that no "statutorily required minimum sentence" exists for purposes of Sentencing Guidelines § 5G1.1(b) once a Section 3553(e) motion is filed, the Guidelines Manual itself considers a statutory minimum to be a "statutorily required minimum sentence" even in that circumstance. Br. 26 (citation and emphasis omitted). The commentary to Sentencing Guidelines § 5K1.1 describes a Section 3553(e) motion as an event that "may justify a sentence *below a statutorily required minimum sentence*." Sentencing Guidelines § 5K1.1, comment. (n.1) (emphasis added). That description cannot be squared with petitioners' contention that a Section 3553(e) motion inherently eliminates a "statutorily required minimum sentence," as that term is used in the Guidelines. Cf. *Stinson* v. *United States*, 508 U.S. 36, 42-43 (1993) (noting significance of policy statements and commentary under Sentencing Guidelines § 1B1.7).

The Guidelines' approach to the interaction of statutory minimums and substantial-assistance departures is consistent with the sentencing scheme's overarching distinction between the "sentencing range" for a typical offender (which is sometimes a statutory minimum) and individualized factors that may warrant a departure for a particular offender (such as substantial assistance). See, *e.g.*, 18 U.S.C. 3553(a)(4)-(5); Sentencing Guidelines §§ 1B1.1(a)-(b), 5K1.1, comment. (background). And where, as here, a statutory minimum provides the relevant "sentencing range," it is not a "sentencing range" that the Commission can "lower[]." 18 U.S.C. 3582(c)(2); see, *e.g.*, *Dorsey*, 567 U.S. at 266-267; *Neal*, 516 U.S. at 290. It therefore cannot serve as the predicate for a sentence reduction under Section 3582(c)(2).

B. The Substantial-Assistance Departures That Petitioners Received Under 18 U.S.C. 3553(e) Were Not "Based On" The Later-Amended Drug Guidelines

In any event, even under the broadest conceivable interpretation of the term "sentencing range," a defendant whose otherwise-applicable guidelines calculation was superseded by a statutory minimum was not sentenced "based on" that prefatory calculation, 18 U.S.C. 3582(c)(2). The relevant statutes, guidelines, and policy statements all dictate that a defendant who is thus subject to a statutory minimum, but who receives a lower sentence pursuant to a substantial-assistance motion under Section 3553(e), is sentenced "based on" the statutory minimum and individualized factors bearing on the proper reward for his substantial assistance—not "based on" any guideline that might otherwise have applied. Petitioners' contrary view of substantial-assistance departures is at odds with the statutory sentencing framework, the law that every circuit has applied on

direct review of such departures, and the procedures followed at their own sentencings.

1. A departure under Section 3553(e) is anchored to the statutory minimum

As the court of appeals correctly recognized, "[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." J.A. 52. Indeed, every court of appeals to consider that issue has so held. See, *e.g.*, *United States* v. *Joiner*, 727 F.3d 601, 609 (6th Cir. 2013), cert. denied, 134 S. Ct. 1357 (2014); *United States* v. *Mills*, 613 F.3d 1070, 1076 (11th Cir. 2010); *United States* v. *Roa-Medina*, 607 F.3d 255, 260-261 (1st Cir. 2010); *United States* v. *Carter*, 595 F.3d 575, 578-579 (5th Cir. 2010) (per curiam); *United States* v. *Jackson*, 577 F.3d 1032, 1035 (9th Cir. 2009); *United States* v. *Hood*, 556 F.3d 226, 235 (4th Cir.), cert. denied, 558 U.S. 921 (2009); *United States* v. *Poole*, 550 F.3d 676, 680 (7th Cir. 2008); *United States* v. *A.B.*, 529 F.3d 1275, 1284-1285 (10th Cir.), cert. denied, 555 U.S. 962 (2008).

Section 3553(e) authorizes a sentencing court, following a motion by the government, "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." 18 U.S.C. 3553(e). The plain language of that authorization anchors any resulting sentence to the "level established by statute as a minimum sentence," by specifying the limited circumstances in which a court may impose a sentence "below" that level. *Ibid.* Section 3553(e)'s title—"Limited authority to impose a sentence below a statutory minimum"—

likewise treats the "statutory minimum" as the baseline for the sentences that are authorized. *Ibid.* (capitalization altered); see *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'") (citation omitted); see, *e.g.*, *United States* v. *Williams*, 474 F.3d 1130, 1132 (8th Cir. 2007) (relying on title of Section 3553(e)); *United States* v. *Ahlers*, 305 F.3d 54, 59 (1st Cir. 2002) (same).

This Court has accordingly described Section 3553(e) as allowing for "a departure below the statutory minimum," *Melendez*, 518 U.S. at 130, not a departure relative to the Guidelines. Indeed, it has held that even if a sentencing court is authorized to grant a substantial-assistance departure from the Guidelines themselves, a separate motion relying on Section 3553(e) is necessary to "request[] or authoriz[e] a departure below the statutory minimum." *Ibid.* For example, if a defendant's guidelines range is 135 to 168 months of imprisonment, but he is subject to a 120-month statutory minimum, the court may not impose a sentence below 120 months unless the government files a motion that specifically references Section 3553(e) (not just Section 5K1.1). *Id.* at 122-123. The requirement that, irrespective of the Guidelines, the government must file a motion under Section 3553(e) to allow for a departure below a statutory minimum confirms that the statutory minimum is the starting point for the Section 3553(e) departure.

Petitioners' characterization of Section 3553(e) as allowing a defendant who provides substantial assistance to "escape," to be "relieved of," or to be "free" from a statutory minimum is correct only in the limited sense

that a Section 3553(e) motion allows for a departure that would not otherwise be available. Br. 26, 28 (brackets and citation omitted). The statute authorizes only an anchored departure from, not the complete elimination of, that statutory minimum. The contrast between Section 3553(e) and the neighboring subsection—18 U.S.C. 3553(f), which Congress added in 1994, see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1985—is telling. Unlike Section 3553(e), which authorizes the sentencing court (if certain criteria are met) "to impose a sentence below a level established by statute as a minimum sentence," 18 U.S.C. 3553(e), Section 3553(f) authorizes a court (if different criteria are met) to impose a sentence "without regard to any statutory minimum sentence," 18 U.S.C. 3553(f).

The "sharp divergence between these regimes," particularly their "radically" different text, "leads inexorably to the conclusion that Congress had different plans in mind for the operation and effect of the two provisions." *Ahlers*, 305 F.3d at 58-59. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). That principle applies even when the two subsections were enacted at different times. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) (recognizing that the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute").

Petitioners "offer no explanation as to why two provisions with such different architecture and such different goals should be deemed to march in lockstep." *Ahlers*, 305 F.3d at 59.

2. The proper extent of a Section 3553(e) departure depends solely on the appropriate reward for the defendant's substantial assistance

As all 11 courts of appeals to consider the question have recognized, Section 3553(e) authorizes a departure below a statutory minimum only to the extent necessary to reward the defendant for his substantial assistance. See *United States* v. *Spinks*, 770 F.3d 285, 287-288 & n.1 (4th Cir. 2014) (collecting cases); *United States* v. *Winebarger*, 664 F.3d 388, 396 (3d Cir. 2011) (same), cert. denied, 134 S. Ct. 181 (2013). It does not authorize a district court to consider guidelines calculations that fell below the statutory minimum for the purpose of treating the defendant like someone charged with a crime that carried no statutory minimum sentence.

a. Section 3553(e) allows for a departure "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). Although a district court has discretion to determine the extent of that departure, the text of Section 3553(e) "specifies precisely how a sentencing court's authority is limited." *Williams*, 474 F.3d at 1132. The "placement" of the qualifier "'so as to reflect a defendant's substantial assistance'" immediately after the authorization to depart "'below a level established by statute'" as a minimum sentence demonstrates "that the authority granted is limited thereby." *Ahlers*, 305 F.3d at 60 n.4 (quoting 18 U.S.C. 3553(e)).

That textual choice is significant. "Presumably, Congress could have written the first sentence of § 3553(e) to read, 'Upon motion of the Government *indicating that a defendant has given substantial assistance in the investigation or prosecution of another person who has committed an offense*, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence.'" *Winebarger*, 664 F.3d at 392. But Congress did not do so. Instead, by "explicitly" stating that the departure should "reflect" a defendant's assistance, Congress ensured that a court does not have "carte blanche to sentence a defendant below a statutory minimum sentence based on non-assistance-related factors once it is established that the defendant provided assistance to the government." *Id.* at 392-393. Section 3553(e)'s title underscores the point by describing the court's "authority to impose a sentence below" the statutory minimum as "limited." 18 U.S.C. 3553(e) (capitalization altered); see *Florida Dep't of Revenue*, 554 U.S. at 47.

b. The substantial-assistance-focused nature of a Section 3553(e) departure is additionally reinforced by the congruence between the language of Section 3553(e) and language limiting courts' discretion to modify sentences under the amendments to Federal Rule of Criminal Procedure 35(b) enacted at the same time as Section 3553(e). See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, §§ 1007(a), 1009(a), 100 Stat. 3207-7, 3207-8. Before Section 3553(e) was enacted in 1986, Rule 35(b) allowed a district court to modify a sentence within a certain period following judgment, without any express limitation as to the permissible reasons for such a modification. See Fed. R. Crim. P. 35(b) (1985). In conjunction with Section 3553(e)'s enactment, and

piggybacking on a similar amendment to Rule 35 two years earlier whose effective date had been delayed, see SRA §§ 215(b), 235, 98 Stat. 2015-2017, 2031-2033; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728, Congress significantly narrowed the Rule to permit only modifications for substantial assistance.

As narrowed, Rule 35(b) only allowed a court, following a government motion, to lower a previously imposed sentence (including below a statutory minimum) "*to reflect a defendant's subsequent, substantial assistance* in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission." Fed. R. Crim. P. 35(b) (1987) (Amendment) (emphasis altered). The "reflect" language was removed by the Rules Committee in 2002 "as part of the general restyling of the Criminal Rules," Fed. R. Crim. P. 35 advisory committee's note (2002), and courts are not uniform in their interpretation of the current language, compare, *e.g.*, *United States* v. *Grant*, 636 F.3d 803, 814 (6th Cir. 2011) (en banc), cert. denied, 565 U.S. 931 (2011) and *United States* v. *Poland*, 562 F.3d 35, 41 (1st Cir. 2009), with *United States* v. *Tadio*, 663 F.3d 1042, 1047 (9th Cir. 2011), cert. denied, 566 U.S. 1029 (2012). But the import of the "reflect" language in both the amended Rule 35(b) and Section 3553(e) was expressly recognized at the time those provisions were introduced. The legislative package proposed by President Reagan made clear that the amendments to Rule 35(b) were of a piece with Section 3553(e) and would allow a reduction only "*to the extent that such assistance is a factor* in the applicable guidelines or policy statements of the Sentencing Commission." *The Drug Free*

America Act of 1986: Message from the President of the United States, H.R. Doc. No. 266, 99th Cong., 2d Sess. 118 (1986) (emphasis added) (1986 Message); see SRA §§ 215(b), 235, 98 Stat. 2015-2017, 2031-2033 (similar "factor" wording in 1984 amendment). The substantially identical language of Section 3553(e) necessarily imposes a similar limitation.

c. Petitioners err in contending (Br. 32-34) that a district court can "reflect a defendant's substantial assistance" to law enforcement, 18 U.S.C. 3553(e), by consulting a superseded guidelines calculation that was centered around the kind and quantity of drugs the defendant trafficked. Petitioners suggest that Section 3553(e) accomplishes that result by requiring that a sentence under it "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. 994]." Br. 20, 28 (citation omitted). They also rely (Br. 31-32) on 28 U.S.C. 994(n), which directs the Commission to "assure that the guidelines reflect the general appropriateness of imposing * * * a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance." But as this Court has explained, "the relevant parts of the statutes merely charge the Commission with constraining the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum." *Melendez*, 518 U.S. at 129. They do not provide that the statutory minimum disappears from the picture entirely or that a superseded guidelines calculation is resurrected.

Had Congress intended that result, it would have used the same language it employed in the neighboring

subsection, Section 3553(f), entitled "Limitation on applicability of statutory minimums in certain cases." 18 U.S.C. 3553(f) (capitalization altered). Section 3553(f) authorizes a sentence "pursuant to guidelines promulgated by the United States Sentencing Commission under [28 U.S.C. 994] without regard to any statutory minimum sentence," for certain minor drug offenders. *Ibid.* Section 3553(f), unlike Section 3553(e), unambiguously eliminates the applicability of the statutory minimum for all purposes and authorizes sentencing based on the otherwise-applicable guidelines calculation. Its text and title "show[] that Congress knew how to draft the kind of statutory language that petitioner[s] seek[] to read into" Section 3553(e). *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016). The omission of similar language in Section 3553(e) strongly indicates that "Congress intended a difference in meaning." *Loughrin*, 134 S. Ct. at 2390; see *Russello*, 464 U.S. at 23.

d. Tying a Section 3553(e) departure to a defendant's below-statutory-minimum guidelines calculation would undermine Section 3553(e)'s basic function. Unlike Section 3553(f), which is a "safety valve" designed to relieve less culpable drug offenders from the operation of statutory minimum sentences, see H.R. Rep. No. 460, 103d Cong., 2d Sess. 5 (1994), Section 3553(e) is simply a system for rewarding fully culpable defendants for assisting law enforcement. Section 3553(e) was enacted as part of an omnibus package that included many new statutory minimum drug penalties, including those in 21 U.S.C. 841(b)(1). The legislative package proposed by President Reagan explained that Section 3553(e) would obviate any need for prosecutors to reward cooperators

by charging "a less serious offense * * * to avoid mandatory minimum sentences," by allowing prosecutors to instead "reflect accurately" that a defendant had committed a crime warranting a statutory minimum, while still providing such a defendant with an incentive to cooperate. 1986 Message 118; see *id.* at 117.

Sentencing a cooperating defendant by reference to the guidelines calculation that would apply in the absence of a statutory minimum would treat him as though he were, in fact, charged with a "less serious offense"—*e.g.*, a non-recidivist version of drug-trafficking, see 21 U.S.C. 841(a)(1); cf. *United States* v. *Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013) (Gorsuch, J.) (describing Section 841(b)(1) as "a statute aimed at punishing recidivism"). Nothing suggests that the President or Congress intended that a recidivist cooperator be viewed for statutory purposes as a defendant who is not a recidivist at all. Rather, Section 3553(e) indicates that he should be sentenced like other recidivist offenders, except to the extent that his cooperation merits a reward.

e. Even assuming the Commission could permissibly adopt a non-reward-based approach to substantial-assistance sentencing, it has not done so. Instead, the Commission has complied with its mandate under Sections 3553(e) and 994(n) by promulgating Sentencing Guidelines § 5K1.1, which itself requires that substantial-assistance departures be premised on substantial-assistance-related factors. See *id.* § 5K1.1(a); *id.* § 5K1.1, comment. (n.1); *Melendez*, 518 U.S. at 129-130 & n.10; see also *Winebarger*, 664 F.3d at 394-395; *United States* v. *Pepper*, 412 F.3d 995, 999 (8th Cir. 2005) (collecting circuit cases that have reached that conclusion); *United States* v. *Casiano*, 113 F.3d 420, 429 (3d Cir.) (same), cert. denied 552 U.S. 887 (1997).

Section 5K1.1 does not direct a sentencing court considering a substantial-assistance departure under Section 3553(e) to consult any guidelines calculation that the statutory minimum may have superseded. Instead, it guides the district court in selecting a sentence below the statutory minimum through an illustrative list of reasons that may inform the court's "determin[ation] of the departure." *Melendez*, 518 U.S. at 129 & n.10. In particular, it lists (1) the court's and government's "evaluation of the significance and usefulness of the defendant's assistance"; (2) "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant"; (3) "the nature and extent of the defendant's assistance"; (4) "any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance"; and (5) "the timeliness of the defendant's assistance." Sentencing Guidelines § 5K1.1(a).

Although that list is not exhaustive, its exclusive focus on substantial assistance—rather than other considerations—indicates that the inquiry as a whole should turn on substantial-assistance-related factors. See, *e.g.*, *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 164 (2012) (deriving limitation from shared characteristics of items on nonexhaustive list); *Samantar* v. *Yousuf*, 560 U.S. 305, 317 (2010) (similar); *Winebarger*, 664 F.3d at 394 (applying "*ejusdem generis*" principle to Section 5K1.1). The commentary to Section 5K1.1 reinforces that interpretation. Cf. *Stinson*, 508 U.S. at 42-43. It explains that what may "justify a sentence below a statutorily required minimum sentence" is "substantial assistance in the investigation or prosecution of another person who has committed an of-

fense," without reference to any other potential considerations. Sentencing Guidelines § 5K1.1, comment. (n.1). It additionally clarifies that the "sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility," *id.* § 5K1.1, comment (n.2)—a reduction that is part of the separate default guidelines calculation, see *id.* § 3E1.1. And the background note makes clear that the reason for Section 5K1.1's "[l]atitude" as to the "relevant factors" is that the "nature, extent, and significance *of assistance* can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis." *Id.* § 5K1.1, comment. (background) (emphasis added).

f. Some courts of appeals considering substantial-assistance departures under Section 3553(e) have indicated that "after the court has determined the full extent of the downward departure it would award based on * * * substantial assistance," it may "consider other factors, including those in § 3553(a), to decide whether to depart to that full extent." *United States* v. *Williams*, 551 F.3d 182, 186 (2d Cir. 2009); see also, *e.g.*, *Winebarger*, 664 F.3d at 395; *Jackson*, 577 F.3d at 1036; cf. *United States* v. *Rublee*, 655 F.3d 835, 839 (8th Cir. 2011) (similar in context of postsentencing substantial-assistance motion under Fed. R. Crim. P. 35(b)), cert. denied, 565 U.S. 1240 (2012); but see, *e.g.*, *United States* v. *Fulton*, 431 Fed. Appx. 732, 733 (10th Cir. 2011) (Gorsuch, J.) (rejecting reliance on such considerations) (citing *A.B.,* 529 F.3d at 1284-1285).

That approach lacks a firm grounding in Section 3553(e) (or Section 5K1.1), although it could potentially be supported by a sentencing court's "overarching duty" to impose a "'sentence sufficient, but not greater

than necessary,' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)," *Pepper*, 562 U.S. at 491 (quoting 18 U.S.C. 3553(a)). But even assuming it is allowed, that approach provides no foundation for petitioners' open-ended view of substantial-assistance departures.

It does not appear that any court of appeals allows consideration of factors unrelated to substantial assistance to impose a *lower* sentence than substantial-assistance factors alone would permit. And the imposition of a *higher* sentence on a cooperator based on general sentencing factors is the functional equivalent of varying upward from the statutory minimum before granting an award for substantial assistance. See *A.B.*, 529 F.3d at 1285-1286; cf. J.A. 216-219 (following such a variance-based approach for petitioner Gutierrez). Nothing in such a procedure suggests that Section 3553(e) rewards substantial assistance by allowing a defendant to be sentenced pursuant to the guidelines calculation that would apply if he were not subject to a statutory minimum at all. See *Roa-Medina*, 607 F.3d at 260; *Hood*, 556 F.3d at 235-236.

3. The sentencing proceedings in petitioners' cases illustrate the proper procedure for a substantial-assistance departure under Section 3553(e)

The district court here correctly recognized that the government's Section 3553(e) motions did not authorize an open-ended sentencing, but instead only a limited substantial-assistance-focused departure.

a. As detailed above, see pp. 8-11, *supra*, the district court in each of petitioners' cases limited its departure below the relevant statutory minimum to the extent justified by each petitioner's substantial assistance, as informed by the factors in Sentencing Guidelines § 5K1.1.

In four of the cases, the district court relied on those factors to calculate the departure as a percentage of the statutory minimum. See J.A. 115-116, 148-153, 174-177, 197-198. In the fifth, the court relied on the factors to depart down a specified number of months from an upward variance from the statutory minimum. J.A. 216-218.

At no point in any of petitioners' sentencing proceedings did the district court suggest that its ultimate sentence was influenced by a calculation of the guidelines without regard to the applicable statutory minimums. Indeed, the record contains multiple indications to the contrary. In the case of petitioner Putensen, who was subject to a statutory-minimum term of life imprisonment, the court engaged in a lengthy discussion about the number of months that term represented, in order to inform its mathematical departure calculation. J.A. 159, 166-169. In two cases, the court either explicitly disclaimed, or expressed uncertainty about, its ability to consult the general sentencing factors under Section 3553(a). J.A. 115-116, 177-178. And in two cases, the court expressed interest in evidence or statistics about how other cooperators—not how nonrecidivist offenders not subject to statutory minimums—had been treated for sentencing purposes. J.A. 152-153, 188-193.

b. Notwithstanding its legal irrelevance, sentencing courts—and the government itself—do sometimes, as a practical matter, reference a guidelines calculation that has been superseded by a statutory minimum in the context of a Section 3553(e) motion. See, *e.g.*, *In re Sealed Case*, 722 F.3d 361, 363-364 (D.C. Cir. 2013) (describing Section 3553(e) sentencing where district court discussed "[t]he guideline range, if there had not been the mandatory minimum"); *United States* v. *Savani*,

733 F.3d 56, 59 (3d Cir. 2013) (describing Section 3553(e) sentencing where government requested a sentence within a superseded guideline range).

Such occurrences may reflect that some courts and parties reflexively follow the same procedures in all substantial-assistance cases, without distinguishing between cases in which the initial guidelines calculation is above the statutory minimum (in which case it remains relevant to the sentencing) and those in which the initial guidelines calculation is below the statutory minimum (in which case it does not). Petitioners cite (Br. 15-16, 23), for example, a letter to the Commission in which the government incorrectly failed to draw that distinction and described the relevant law in a manner at odds with its own longstanding litigating position. Compare Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legis., U.S. Dep't of Justice, to Hon. Patti B. Saris, U.S. Sentencing Comm'n 4 (Mar. 6, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf, with, *e.g.*, *United States* v. *Richardson*, 521 F.3d 149, 151 (2d Cir. 2008) (affirmative government appeal arguing that "the starting point for a reduced sentence" under Section 3553(e) "is the statutory minimum sentence" and that "the only factors to be considered in this case are those relating to [the defendant's] cooperation"). A sentencing judge's reference to a superseded guidelines calculation may also occur because the judge "'at least ha[s] in his or her mind' what the defendant's guidelines range is 'absent the mandatory minimum,'" Pet. Br. 23 (citation omitted), even though it falls outside the proper legal framework.

In any event, even assuming that judges in some districts have with some frequency pegged Section 3553(e)

departures to below-statutory-minimum guidelines calculations, see NAFD Amicus Br. 18-24, that practice is contrary to the law of every circuit that has addressed the issue. See pp. 29, 32, *supra*. Neither petitioners nor their amici identify any court of appeals decision expressly endorsing such a practice on direct review of a sentencing proceeding that exhibited it. They instead primarily rely on decisions arising in the context of Section 3582(c)(2) proceedings, where the district court at the original sentencing had (improperly) referred to a superseded guidelines calculation in the Section 3553(e) context. See *In re Sealed Case*, *supra*; *Savani*, *supra*. The question whether such references were proper was thus not directly presented, and to the extent those courts treated them as legally authorized, that was incorrect for all the reasons described above. Indeed, at least one of the decisions is in tension with prior circuit authority (that the majority did not directly address). See *Winebarger*, 664 F.3d at 395.

In any event, as just discussed, no such reference occurred at petitioners' sentencing proceedings. Although petitioners note (Br. 23) that some of their sentences wound up in the range that would have applied in the absence of a statutory minimum, the record demonstrates that was by happenstance—not design.

4. A below-statutory-minimum guidelines calculation is not a "sentencing range" on which a Section 3553(e) departure is "based"

Section 3582(c)(2) does not permit the conclusion that petitioners' sentences were "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). The only role that the drug guidelines modified by Amendment 782 played at each petitioner's sentencing proceeding

was in a computation establishing that the sentence they recommended was inconsistent with statutory law (namely, the minimum sentence required by 21 U.S.C. 841(b)(1)) and should therefore be disregarded.

a. In ordinary language, a result is "based on" a particular consideration if that consideration is "the fundamental part," *Webster's Third New International Dictionary of the English Language* 180 (1981), or the "chief ingredient," *Webster's New International Dictionary of the English Language* 225 (2d ed. 1957), in producing the result. See also 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (defining "base" as the "main or most important element or ingredient" in something). In accord with that plain meaning, this Court in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), held that a legal claim is "based upon" a particular activity for purposes of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(2), only when the activity is the "basis" or "foundation" for the claim (*i.e.*, one of its "elements"), not when it is merely "connect[ed] with" or "led to the conduct" underlying the claim. *Nelson*, 507 U.S. at 357-358; see also *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395-397 (2015) (tort claim by plaintiff injured on train platform in Austria was "based upon" activity that caused injury in Austria, not train ticket sales in the United States).

In *Freeman*, *supra*, this Court addressed, but did not produce a majority opinion on, the meaning of "based on" in Section 3582(c)(2). The defendant in *Freeman* had entered into, and the district court in *Freeman* had accepted, a plea agreement that included a sentence that was binding on the court under Federal Rule of Criminal Procedure 11(c)(1)(C). See 564 U.S. at 528 (plurality opinion).

Four Justices concluded in an opinion by Justice Kennedy that a defendant in that position is eligible for a sentence reduction under Section 3582(c)(2) "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Freeman*, 564 U.S. at 530. The plurality stated that a sentence would be based on a guidelines sentencing range if, for example, "the judge uses the sentencing range as the beginning point to explain the decision to deviate from it" or consults the subsequently lowered guidelines range in deciding whether to approve the plea agreement. *Id.* at 529.

Concurring in the judgment, Justice Sotomayor reasoned that "[t]o ask whether a particular term of imprisonment is 'based on' a Guidelines sentencing range is to ask whether that range serves as the basis or foundation for the term of imprisonment." *Freeman*, 564 U.S. at 535. She determined that a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement generally will be "based on" the agreement itself, not on any guidelines range, even if it was considered by the district court. *Id.* at 535-536. She added, however, that "if a [Rule 11(c)(1)(C)] agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is 'based on' the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2)." *Id.* at 534.

A four-Justice dissent authored by Chief Justice Roberts identified the "based on" requirement as "the initial prerequisite" for a sentence reduction, and concluded that a defendant sentenced under a Rule

11(c)(1)(C) agreement can never satisfy that prerequisite. *Freeman*, 564 U.S. at 544-545. The dissent explained that such a defendant's sentence is always "based on" the agreement, not the guidelines, regardless of whether the court "considered the Guidelines in deciding whether to accept the agreement." *Id.* at 545.

b. The lower courts have divided over how to interpret the decision in *Freeman*, and this Court has granted a petition for a writ of certiorari to address that issue in *Hughes* v. *United States*, cert. granted, No. 17-155 (oral argument scheduled for Mar. 27, 2018). But none of the approaches in *Freeman* suggests that petitioners are eligible for sentence reductions here. See J.A. 55.

As discussed above, an initial guidelines calculation properly drops out of the sentencing equation altogether once the sentencing court determines that it falls below a statutory minimum, even if the defendant receives a substantial-assistance departure under Section 3553(e). A guideline that is superseded in that manner is not "a relevant part of the analytic framework the judge used to determine the sentence," *Freeman*, 564 U.S. at 530, under the *Freeman* plurality's approach; it does not "serve[] as the basis or foundation for the term of imprisonment, *id.* at 535, under Justice Sotomayor's approach; and any prefatory "consider[ation]," *id.* at 545, of the guideline falls far short of what the dissent's approach requires.

Because a below-statutory-minimum guidelines calculation should have no legal effect on a sentence imposed pursuant to Section 3553(e), no need exists to examine each case to determine whether the sentencing court may have erroneously referenced it. A sentencing court's commission of such an error at a sentencing proceeding is not a proper basis for granting a defendant the benefit of a sentence reduction to which he would

not otherwise be entitled. Cf. *Dillon*, 560 U.S. at 824-828 (proceedings under Section 3582(c)(2) do not encompass sentencing errors). But even if such a case-by-case approach were proper, it would not change the result here, where the record demonstrates that the superseded drug guideline did not affect petitioners' sentences. See pp. 5-11, 40-41, *supra*; accord *United States* v. *Rodriguez-Soriano*, 855 F.3d 1040, 1044-1046 (9th Cir. 2017) (finding defendant ineligible for sentence reduction absent indication in the record that his sentence was based on superseded drug guidelines), petition for cert. pending, No. 17-6292 (filed Oct. 6, 2017).

c. Petitioners err in contending (Br. 19-24) that their sentences were "based on" the drug-quantity guidelines because the district court "needed to consult" those guidelines as a procedural matter in order to determine that they had been superseded by the statutory minimums. See Sentencing Guidelines § 1B1.1(a). Such a sweeping interpretation of "based on" would expand Section 3582(c)(2)'s "narrow exception" to the "rule of finality," *Dillon*, 560 U.S. at 825-827, far beyond where any opinion in *Freeman* would take it. Indeed, even the petitioner in *Hughes* appears to disavow such an interpretation. See Pet. Br. 20, *Hughes*, *supra* (No. 17-155).

Petitioners rely primarily on the *Freeman* plurality's statement that "[t]he Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion." Pet. Br. 21 (citation omitted; brackets in original); see also *id.* at 22 (describing the guidelines as "'the beginning point' of [a court's] sentencing process") (quoting *Peugh*, 569 U.S. at 542). But *Freeman* did not

present any legal question involving a statutory minimum. And, in any event, the relevant question under Section 3582(c)(2) is not about the "Guidelines" writ large, but instead the particular set of guidelines calculations that the Commission has retroactively modified. See 18 U.S.C. 3582(c)(2). In the sentencing proceedings here, as in any properly conducted similar proceeding, the drug guidelines that the Commission subsequently lowered played no role in the sentences that the district court in fact imposed. Only the statutory minimums (which the Commission cannot alter) and substantial-assistance factors did.

Petitioners' proposed interpretation of "based on" cannot be squared with any ordinary understanding of that phrase. A taxpayer's bill, for example, is not "based on" the alternative minimum tax when he calculates that alternative tax only to confirm that it is lower than what he would otherwise pay. Cf. 26 U.S.C. 55. Or consider a real-estate company whose listing fee is "1 percent of the final sale price, subject to a minimum of" $4500. Alina Ptaszynski, *One Percent Listing Fee Arrives in 18 Additional Markets* (Oct. 2, 2017), https://www.redfin.com/blog/2017/10/ 1-percent-listing-announcement.html. If a home sells for $300,000, the client's $4500 payment is not "based on" the $3000 that he would have owed in the absence of the minimum. If the real-estate company later retroactively reduced the default listing fee to ½% of the final sales price, without changing the minimum, nobody would consider the client to be eligible for a rebate.

C. The Commission's Policy Statement Implementing Section 3582(c)(2) Cannot Allow Petitioners To Satisfy The Requirements Of The Statute

Petitioners invoke (Br. 25-34) the Commission's policy statement on Section 3582(c)(2), Sentencing Guidelines § 1B1.10, to argue that they are eligible for sentence reductions. But as the courts below correctly explained, the policy statement does not change the fact that petitioners' sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see J.A. 51-56, 70-91. Moreover, neither Section 3582(c)(2) nor Section 3553(e)—nor 28 U.S.C. 994(n), which petitioners also invoke (Br. 31-32)—empowers the Commission to authorize reduction of a sentence below a statutory minimum for reasons unrelated to substantial assistance.

1. Section 3582(c)(2) authorizes a sentence reduction for a defendant "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." See *Dillon*, 560 U.S. at 824-825 (citation omitted). The "relevant policy statement," which is binding on district courts, is found in Sentencing Guidelines § 1B1.10. *Dillon*, 560 U.S. at 821; see *id.* at 819.

As the statutory text makes clear, the Commission's role in sentence reductions under Section 3582(c)(2) is important, but circumscribed. The Commission has authority to decide whether to retroactively "lower[]" an amendable "sentencing range"; it has authority, through "policy statements," to limit sentence-reduction eligibility to only a subset of the defendants whose sentences

were "based on" that range; and it has authority, through "policy statements," to limit the permissible extent of any reduction for which a defendant is eligible. 18 U.S.C. 3582(c)(2); see *Dillon*, 560 U.S. at 826; see also 28 U.S.C. 994(u) (requiring guideline amendments to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced"); *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (noting that 28 U.S.C. 994(u) is implemented by Sentencing Guidelines § 1B1.10). The Commission does not, however, have the authority to decide whether a defendant's sentence was "based on" the "sentencing range" that it has lowered. 18 U.S.C. 3582(c)(2).

2. Because the statutory inquiry into whether a defendant's sentence was "based on" a lowered range turns on a question of historical fact, nothing in Sentencing Guidelines § 1B1.10 could render defendants like petitioners eligible for sentence reductions. Although the current version of Section 1B1.10 makes clear that such defendants should be eligible for reductions from the Commission's perspective, the statutory eligibility requirements remain preclusive. Cf. Sentencing Guidelines § 1B1.10(a) (recognizing that reductions are available only "as provided by 18 U.S.C. § 3582(c)(2)"). And to the extent the Commission's directives conflict with those of Congress, the policy statement "must give way." *United States* v. *LaBonte*, 520 U.S. 751, 757 (1997).

Under Section 1B1.10's general approach, a court "determining whether, and to what extent, a reduction * * * is warranted" should compute an "amended guideline range" under which the retroactive guidelines are substituted for the original ones. Sentencing Guidelines § 1B1.10(b)(1). If the "amended guideline range" is

lower than the original one, the court has discretion to reduce the defendant's sentence to any level at or above the bottom of the amended range. *Id.* § 1B1.10(b)(2)(A). A reduction is "not authorized" if a guidelines amendment "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)." *Id.* § 1B1.10, comment. (n.1(A)).

A modified approach applies to cases in which a defendant's original sentence was below the original guidelines range by virtue of a substantial-assistance departure. See Sentencing Guidelines § 1B1.10(b)(2)(B). In such a case, a court has discretion to reduce the defendant's sentence even below the bottom of the amended range, so long as the reduced sentence is proportionately no further below the amended range than the original sentence was below the original range. See *ibid.*

That modified approach is unproblematic so long as no statutory minimum is involved. Take the case, for example, of a defendant with an original range of 24-30 months and an amended range of 18-24 months, but who received a substantial-assistance departure under Section 5K1.1 that resulted in a 12-month sentence (50% of the bottom of the original range). Under Section 1B1.10, he could receive a reduction to as low as nine months (50% of the bottom of the amended range). The presence of a statutory minimum, however, complicates the inquiry, and the Commission adopted an amendment in 2014 to respond to difficulties encountered by courts of appeals confronting that situation. See Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014).

The new provision, Sentencing Guidelines § 1B1.10(c), states that in cases involving Section 3553(e) motions,

the "amended guidelines range shall be determined without regard to the operation of § 5G1.1." Thus, in such cases, calculation of the "amended guidelines range" disregards the normal step in which "a statutorily required minimum sentence" higher than the otherwise-applicable guidelines calculation becomes "the guideline sentence." *Id.* § 5G1.1(b). Accordingly, the "amended guidelines range" under Section 1B1.10(c) in petitioners' cases would be the amended versions of the guidelines calculations that, at their sentencings, were superseded by the statutory minimums. The Commission apparently believed—as did the government, which supported the new subsection—that Section 1B1.10(c) would make defendants like petitioners eligible for sentence reductions under 18 U.S.C. 3582(c)(2). See *id.* App. C Supp., Amend. 780 (Nov. 1, 2014); Gov't C.A. Br. 6-27.

That belief was incorrect. Although Section 1B1.10(c) removes the policy statement *itself* as an obstacle to a sentence reduction, it neither does nor could alter the "sentencing range" that a particular defendant's sentence was "based on" as a historical or statutory matter. See *Neal*, 516 U.S. at 290. Notwithstanding Section 1B1.10(c)'s instruction about how to compute the "amended guideline range" in a *sentence-reduction* proceeding, it remains the case that petitioners' *original* sentencing proceedings were subject to the statutory minimums in 21 U.S.C. 841(b)(1) and to Section 5G1.1(b)'s mandate that the "guideline sentence" (and thus the "sentencing range") be set at the statutory minimum. See Part A, *supra*. And notwithstanding that Section 1B1.10 effectively disregards the statutory minimum in sentence-reduction proceedings, the statutory minimum—not the superseded guidelines

calculation—was the starting point for the substantial-assistance departures in petitioners' original sentencing proceedings. See Part B, *supra*.

3. An additional barrier to petitioners' reliance on Section 1B1.10(c) is that nothing in Section 3582(c)(2) or Section 3553(e) allows the Commission to authorize a further reduction of their below-statutory-minimum sentences.

Petitioners do not contend that the Commission could instruct courts considering sentence reductions under Section 3582(c)(2) to disregard statutory minimums in cases that do *not* involve substantial-assistance departures under Section 3553(e). See *Neal*, 516 U.S. at 294 (reasoning that even if the Commission had intended to alter the applicability of a statutory minimum to a defendant, his Section 3582(c)(2) motion "still would not prevail"). Were the Commission empowered to do that, it could circumvent the statutory minimum for any class of defendants through manipulation of the Guidelines. See J.A. 80 (providing example).

Thus, any authority the Commission might have to allow for below-statutory-minimum reductions in cases like petitioners' must come from Section 3553(e). But Section 3553(e) confers no such authority. Although Section 3553(e) authorizes a government-sponsored substantial-assistance departure below a statutory minimum, it does not empower the Commission to authorize a postjudgment sentence reduction to a level below the statutory minimum for reasons unrelated to substantial assistance.

To the extent petitioners' contrary view relies on Section 3553(e)'s requirement that a substantial-assistance departure be "in accordance with the guidelines and policy statements issued by the Sentencing Commission" (or Section 994(n)'s instruction to promulgate

such guidelines and policy statements), Pet. Br. 28 (emphasis omitted), that reliance is misplaced. That proviso gives the Commission authority to constrain substantial-assistance departures when they are available, not to make below-minimum sentences available in circumstances that Congress has not authorized. See *Melendez*, 518 U.S. at 129-130.

D. Sentence Reductions For Petitioners Would Subvert The Function Of Section 3582(c)(2) By Increasing Sentencing Disparities

Allowing petitioners' sentences to be reduced even further below the statutory minimum would produce the precise types of "unwarranted disparities," *Freeman*, 564 U.S. at 525 (plurality opinion), that Section 3582(c)(2) exists to eliminate. Among other things, petitioners' approach would anomalously make them better off for having been sentenced before, rather than after, Amendment 782 was promulgated.

1. Section 3582(c)(2) "represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon*, 560 U.S. at 828. The prospect of a sentence reduction thus protects against the "inequality" that would result if defendants whose sentences "depend on frameworks" the Sentencing Commission retroactively rejected are forced to "linger in prison" longer than similarly situated defendants sentenced today. *Freeman*, 564 U.S. at 525-526 (plurality opinion).

Sentence reductions for petitioners would create, rather than decrease, timing-based sentencing disparities. As the district court expressly recognized with respect to petitioner Feauto (J.A. 89), each petitioner would "receive the identical sentence" to the one he has

now if sentenced for the first time today, after Amendment 782. Although the amendment would result in an even lower prefatory guidelines calculation, that calculation would still be superseded by the statutory minimum. See Sentencing Guidelines §§ 1B1.1(a)(7), 5G1.1(b); see also, *e.g.*, *Dorsey*, 567 U.S. at 266-267 (statutory minimums supersede lower initial guidelines ranges). And the substantial-assistance departure would still be calculated from that statutory minimum. See Part B.1, *supra*.

What petitioners seek, therefore, is the potential for unwarranted relief. They are, in effect, trying to leverage the happenstance of their pre-Amendment 782 sentencings to obtain sentences that use the drug guidelines, rather than their statutory minimums, as the starting point for their substantial-assistance departures. The following table illustrates, as an example, the situation for petitioner Koons, as compared to an identical defendant sentenced today:

Table 2: Sentence Disparities Under Petitioners' Approach

	Guidelines Calculation Without Mandatory Minimum	**Statutory Minimum**	**Substantial Assistance Departure**	**Sentence**
Koons As Sentenced In 2010	151-188 months	240 months	25%	180 months
Identical Defendant Sentenced Today	121-151 months	240 months	25%	180 months
Koons' Requested Sentence	121-151 months	240 months	25%	As low as 91 months

Nothing would justify those disparities.

Nor would anything justify the disparities that petitioners' approach would create between them and defendants who were sentenced at the same time for identical offenses but who did not provide substantial assistance. See J.A. 88-89. Even under petitioners' approach, that latter class of defendants (whose cases did not involve a Section 3553(e) motion) would not be eligible for sentence reductions under Section 3582(c)(2). But the only difference between those defendants and petitioners—that petitioners provided substantial assistance to law enforcement—is irrelevant to Amendment 782. That amendment exists to "ameliorate the harshness of the drug guidelines, not to reward cooperators twice." J.A. 89; see Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). Lowering the sentences only of cooperators would thus be a nonsensical way to apply the amendment.

2. Petitioners err in suggesting (Br. 38-42) that finding them ineligible for sentence reductions would itself result in unwarranted disparities. Their ineligibility is a consequence of the statutory minimum sentences for the offenses to which they pleaded guilty. Even if petitioners view themselves, by virtue of their superseded guidelines calculations, as less deserving of punishment than offenders whose sentences are likewise dictated by those same statutory minimums, but whose prefatory guidelines calculations were higher, see Br. 35-43, Congress did not.

As petitioners note, a defendant sentenced before Amendment 782 whose drug-guidelines calculation *exceeded* the statutory minimum could potentially be eligible for a sentence reduction under Section 3582(c)(2).

That result is both sensible and consistent with the statutory scheme. Such a defendant's above-minimum range was the initial starting point for that defendant's substantial-assistance departure under Section 5K1.1 and Section 3553(e), and the defendant's sentence was thus "based on" that above-statutory-minimum range.

And such a defendant could not receive any unjustified relief under Section 3582(c)(2), even if he originally received a sentence below the statutory minimum. Consider, for example, a defendant whose guidelines calculation of 135 to 168 months exceeded a statutory minimum of 120 months and who received a 25% departure from the low end of the range, resulting in a below-minimum sentence of 101 months. Cf. Sentencing Guidelines § 1B1.10, comment. (n.4) (describing "Defendant A"). After Amendment 782, the initial guidelines calculation, before accounting for any statutory minimum, would be 108 to 135 months. See *ibid.* But notwithstanding Sentencing Guidelines § 1B1.10(c), a court in a sentence-reduction proceeding could not disregard the 120-month minimum. See Part C.3, *supra*. The government's Section 3553(e) motion did not authorize any departure below the minimum beyond what was justified by the defendant's substantial assistance as determined at the time he was sentenced. Thus, the lowest possible sentence the defendant could receive after the reduction would be 90 months: the 120-month minimum, with a 25% departure for substantial assistance.

If the district court were to exercise its discretion to reduce the sentence to 90 months, that would presumably be because that is the sentence that the court would have imposed if the sentencing had taken place after Amendment 782. And it is the same sentence that a defendant who provided an identical degree of substantial

assistance, but whose drug-guidelines calculation was below the statutory minimum, would receive either before or after Amendment 782. Cf. J.A. 197-198. The ultimate effect of the reduction, therefore, would be to eliminate the effect of the drug guidelines that the Commission has retroactively lowered—the precise result at which Section 3582(c)(2) is aimed.

Petitioners, however, seek a different result that cannot be squared with the function of Section 3582(c)(2). Sentence reductions for them would not eliminate the effect of the drug guidelines, because those guidelines had no effect on their sentences. Such reductions would simply be a windfall—one that the relevant statutes should not be construed to allow.[*]

---

[*] Petitioner Putensen is ineligible for a sentence reduction for the additional reason that he accepted a presidential commutation of his sentence. See J.A. 49-50. Because the President's exercise of the commutation power creates a new, "substituted punishment" that replaces the original sentence, *Biddle* v. *Perovich*, 274 U.S. 480, 486, 487 (1927), his current term is not "based on" any Commission-modifiable "sentencing range," 18 U.S.C. 3582(c)(2). And a federal court may not, in any event, interfere with the President's "plenary authority * * * to reduce a penalty in terms of a specified number of years," *Schick* v. *Reed*, 419 U.S. 256, 266 (1974), by changing the sentence reduction he has directed, cf. *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 147, 148 (1872); *Ex parte Wells*, 59 U.S. (18 How.) 307, 315 (1856).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
CHRISTOPHER G. MICHEL
Assistants to the Solicitor General
DEMETRA LAMBROS
Attorney

FEBRUARY 2018

APPENDIX

1. 18 U.S.C. 3553 provides in pertinent part:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * * *

(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.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has

---

[1] So in original. The period probably should be a semicolon.

been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

2. 18 U.S.C. 3582 provides:

Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(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.

(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

3. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

* * * * *

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of

title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * * * *

4. 21 U.S.C. 846 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. 28 U.S.C. 994 provides in pertinent part:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of

supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11)[1] of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

---

[1] See References in Text note below.

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

* * * * *

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

* * * * *

(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.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

* * * * *

(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.

* * * * *

6. United States Sentencing Guidelines § 1B1.1 provides:

Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* § 1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(6) Determine the defendant's criminal history category as specified in Part A of Chapter

Four. Determine from Part B of Chapter Four any other applicable adjustments.

(7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).

7. United States Sentencing Guidelines § 1B1.10 provides:

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) AUTHORITY.—

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

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

(2) EXCLUSIONS.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) LIMITATION.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.—

(1) IN GENERAL.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had

been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

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

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

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than

the term of imprisonment the defendant has already served.

(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.

8. United States Sentencing Guidelines § 5G1.1 provides:

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.

9. United States Sentencing Guidelines § 5K1.1 provides:

Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.