

No. _____

In the Supreme Court of the United States

October Term, 2018

SEALED APPELLANT, *PETITIONER*,

v.

SEALED APPELLEE

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

MAUREEN SCOTT FRANCO
Federal Public Defender

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Section 3582(c)(2) of Title 18 of the United States Code provides that a district court may reduce a term of imprisonment after it has been imposed if the defendant “has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” In *Koons v. United States*, 138 S. Ct. 1783 (2018), this Court considered whether a defendant, whose mandatory minimum sentence was discarded after the government filed a substantial-assistance motion, could receive a sentence reduction under 18 U.S.C. § 3582(c)(2). The Court held a reduction is unavailable if the initial guidelines range played “no relevant part in the judge’s determination of the defendant’s ultimate sentence[.]” 138 S. Ct. at 1788. The Court left open the question presented here:

Can a defendant receive a 18 U.S.C. § 3582(c)(2) sentence reduction when the district court discarded the mandatory minimum because of a substantial-assistance motion and considered the initial guidelines range before imposing the sentence?

See id. at 1788 & n.1.

No. _____

In the Supreme Court of the United States

October Term, 2018

SEALED APPELLANT, Petitioner,

V.

UNITED STATES

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

Petitioner asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on December 7, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES	1
FEDERAL STATUTES INVOLVED.....	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	7
<p style="padding-left: 40px;">This Case Presents a Question Unanswered in <i>Koons</i>: Whether a Defendant Could Be Eligible for a Sentence Reduction if the Sentencing Court Considered the Initial Guidelines Range After Discarding the Mandatory Mini- mum Pursuant to a Substantial-Assistance Motion.</p>	
CONCLUSION	12
APPENDIX A	<i>Sealed Appellee v. Sealed Appellant</i> , No. 18-50043, unpub. op. (5th Cir. Dec. 7, 2018)
APPENDIX B	18 U.S.C. § 3553(e)
APPENDIX C.	18 U.S.C. § 3582(c)(2)

TABLE OF AUTHORITIES

Cases

<i>Freeman v. United States</i> , 564 U.S. 522 (2011) (plurality opinion)	10
<i>Hughes v. United States</i> , 138 S. Ct. 1765 (2018)	11
<i>In re Sealed Case</i> , 722 F.3d 361 (D.C. Cir. 2013)	9, 10
<i>Koons v. United States</i> , 138 S. Ct. 1783 (2018)	<i>passim</i>
<i>Koons v. United States</i> , No. 17-5716, 2018 WL 1326150 (U.S. 2018)	9
<i>Melendez v. United States</i> , 518 U.S. 120 (1996)	10
<i>United States v. Carter</i> , 595 F.3d 575 (5th Cir. 2010)	5, 6, 8

Statutes

18 U.S.C. § 3553 (2012)	1
18 U.S.C. § 3553(a)	4
18 U.S.C. § 3553(e)	9, 10
18 U.S.C. § 3582(c)	8, 10
18 U.S.C. § 3582(c) (2012)	1
18 U.S.C. § 3582(c)(2)	<i>passim</i>
28 U.S.C. § 1254(1)	1

Rule

Sup. Ct. R. 13.1..... 1

United States Sentencing Guidelines

U.S.S.G. §1B1.10(c) 2, 7

U.S.S.G. §1B1.10(d), p.s. (2014) 4

U.S.S.G. §1B1.10(d), p.s. (Nov. 2014)..... 7

U.S.S.G. §2D1.1(c) (2014) 4

U.S.S.G. §2D1.1(c) (Nov. 2014)..... 7

U.S.S.G. §5G1.1(b) 7

U.S.S.G. §5K1.1 4, 9

U.S.S.G. App C, amend. 750..... 10

U.S.S.G. App. C, amend. 782..... 2, 4, 7

U.S.S.G. App. C, amend. 788..... 4, 7

OPINION BELOW

A copy of the opinion of the court of appeals, *Sealed Appellee v. Sealed Appellant*, No. 18-50043 (5th Cir. Dec. 7, 2018), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The United States Court of Appeals for the Fifth Circuit entered the opinion and judgment on December 7, 2018. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

18 U.S.C. § 3553 (2012):

(e) Limited authority to impose a sentence below a statutory minimum. — Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3582(c) (2012):

The court may not modify a term of imprisonment once it has been imposed except that —

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission.

STATEMENT

This is a direct appeal following the district court's denial of Petitioner's request to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2), implementing the retroactive amendment 782 to the United States Sentencing Guidelines pursuant to policy statement §1B1.10(c). The district court had original jurisdiction over Petitioner's federal criminal prosecution.

In 2008, Petitioner pleaded guilty to a drug trafficking offense that carried a mandatory minimum of 240 months' imprisonment because of a prior drug felony conviction. Without the mandatory minimum, his advisory Guidelines range would have been 135 to 168 months.

The Government filed a motion asking the district court to reduce Petitioner's sentence by two years—to 216 months—because of his substantial assistance. Petitioner requested a sentence of

135 months, the bottom of the advisory Guidelines range but for the mandatory minimum.

At sentencing, Petitioner's counsel explained [REDACTED]

[REDACTED]
[REDACTED] The uncle had recruited Petitioner into the drug trafficking offense [REDACTED]

[REDACTED] The government moved for a sentence below the mandatory minimum in the "king pin" uncle's case, and the uncle was sentenced to 170 months' imprisonment. [REDACTED]
[REDACTED]

The government also moved for a sentence below the mandatory minimum for Petitioner, but only to 216 months' imprisonment.

[REDACTED]
[REDACTED] Petitioner's counsel [REDACTED]
[REDACTED]

[REDACTED] concluded that it was unfair for Petitioner to get four years more than his uncle when the uncle was the mastermind and recruiter.

The government explained [REDACTED]

The district court granted the government's motion but did not calculate a new Guidelines range based on a substantial-assistance departure under guideline §5K1.1. The court acknowledged that Petitioner was asking for a sentence at the bottom of the drug guidelines range that would have applied without the mandatory minimum. The court also wondered why Petitioner was not granted a role reduction, although it acknowledged Petitioner had provided some others opportunities in the criminal activity. The role reduction would not have affected the mandatory minimum but would have reduced the ultimate drug guideline range.

After allocution and considering the sentencing factors of 18 U.S.C. § 3553(a), the court imposed a sentence of 198 months' imprisonment—between the top of the range produced by the Guidelines (168 months) and the sentence requested by the Government (216 months).

Subsequently, the U.S. Sentencing Commission lowered the offense level for drug sentences by two levels and made that change retroactive. *See* U.S.S.G. App. C, amends. 782 & 788; U.S.S.G. §1B1.10(d), p.s. (2014); U.S.S.G. §2D1.1(c) (2014). The district

court appointed the Federal Public Defender to represent people who were potentially eligible for a sentence reduction based on the amended drug-trafficking guideline.

Petitioner moved for a sentence reduction pursuant to § 3582(c)(2). Petitioner calculated the range produced by the amended drug guideline range to be 108 to 135 months' imprisonment. He requested a sentence of 156 months, which, like his original sentence, would be 15.71% above the top of the drug guideline range. Petitioner also argued he merited such a reduction because of his good conduct while in custody, which demonstrated his rehabilitation. The government agreed that Petitioner was eligible for a reduction but argued the court should not grant one because the mandatory minimum "played a greater role" than the drug guideline in determining his sentence.

The district court denied the motion in a written order. The court relied on *United States v. Carter*, 595 F.3d 575 (5th Cir. 2010), which held that a reduction below the mandatory minimum based on a substantial-assistance departure is never "based on" an amended guideline range.

Petitioner appealed but conceded *Carter* foreclosed his argument. The Fifth Circuit stayed the case pending this Court's decision in *Koons v. United States*, 138 S. Ct. 1783 (2018). In *Koons*,

the Court determined petitioners' sentences were based on the mandatory minimums, noting that the district court never considered the lower, initial guidelines ranges after discarding them. 138 S. Ct. at 1788. The Court expressly left open whether defendants subject to mandatory minimum sentences could be eligible for a sentence reduction if the sentencing court had considered the initial drug guidelines range after discarding the mandatory minimum. *Id.* at 1788 & n.1.

After *Koons* was decided, the government moved for summary affirmance, and the Fifth Circuit affirmed, concluding that both *Carter* and *Koons* foreclose Petitioner's argument.

REASONS FOR GRANTING THE WRIT

This Case Presents a Question Unanswered in *Koons*: Whether a Defendant Could Be Eligible for a Sentence Reduction if the Sentencing Court Considered the Initial Guidelines Range After Discarding the Mandatory Minimum Pursuant to a Substantial-Assistance Motion.

Section 3582(c)(2) of Title 18 of the United States Code provides that a district court may reduce a term of imprisonment after it has been imposed if the defendant “has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” Any reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.” § 3582(c)(2).

The U.S. Sentencing Commission lowered the offense level for drug sentences by two levels and made that change retroactive. See U.S.S.G. App. C, amends. 782 & 788; U.S.S.G. §1B1.10(d), p.s. (Nov. 2014); U.S.S.G. §2D1.1(c) (Nov. 2014). The Commission also advised that, in calculating the reduced sentence, “the amended guideline range shall be determined without regard to the operation of § 5G1.1[.]” U.S.S.G. §1B1.10(c). Guideline §5G1.1(b) makes the statutory mandatory minimum the guideline sentence if it is greater than the maximum of the applicable guideline range.

In *Koons*, the Court addressed the interaction between statutory mandatory minimums, substantial-assistance motions, and §

3582(c). 138 S. Ct. at 1788. It held that the sentencing court's calculation of the drug guidelines range before adjusting the range to the mandatory minimum does not make a defendant sentenced below a mandatory minimum pursuant to substantial-assistance motion eligible for a sentence reduction. *Id.* at 1789. That sentence is not necessarily "based on" the amended range. Instead, the Court looked at whether the sentencing court considered the initial guidelines range when it imposed the ultimate sentence, after discarding the mandatory minimums. *Id.* at 1788. The sentencing court in *Koons* never revisited the original ranges. *Id.* at 1788. The Court held those sentences were not "based on" the drug guidelines. *Id.* at 1788–89.

The Court expressly left open whether defendants, like Petitioner, could be eligible for sentence reductions if the sentencing court considered the initial drug guidelines ranges *after* discarding the mandatory minimums. 138 S. Ct. at 1788 & n.1. It did not hold that defendants subject to mandatory minimum sentences could never receive sentence reductions under § 3582(c)(2), *id.*, the position taken by the Fifth Circuit in *United States v. Carter*, 595 F.3d 575, 581 (5th Cir. 2010).

The *Koons* Court avoided deciding whether the “sentencing range” referenced in § 3582(c)(2) is the mandatory minimum sentence for defendants such as Petitioner, even after the court grants a § 3553(e) motion. 138 S. Ct. at 1788 n.1. Such a finding would make any such defendant ineligible for a sentence reduction regardless of the Sentencing Commission’s policy statement. *See id.* at 1790 (the Commission “cannot make a defendant eligible when § 3582(c)(2) makes him ineligible”). But this interpretation of § 3582(c)(2) would be incorrect.

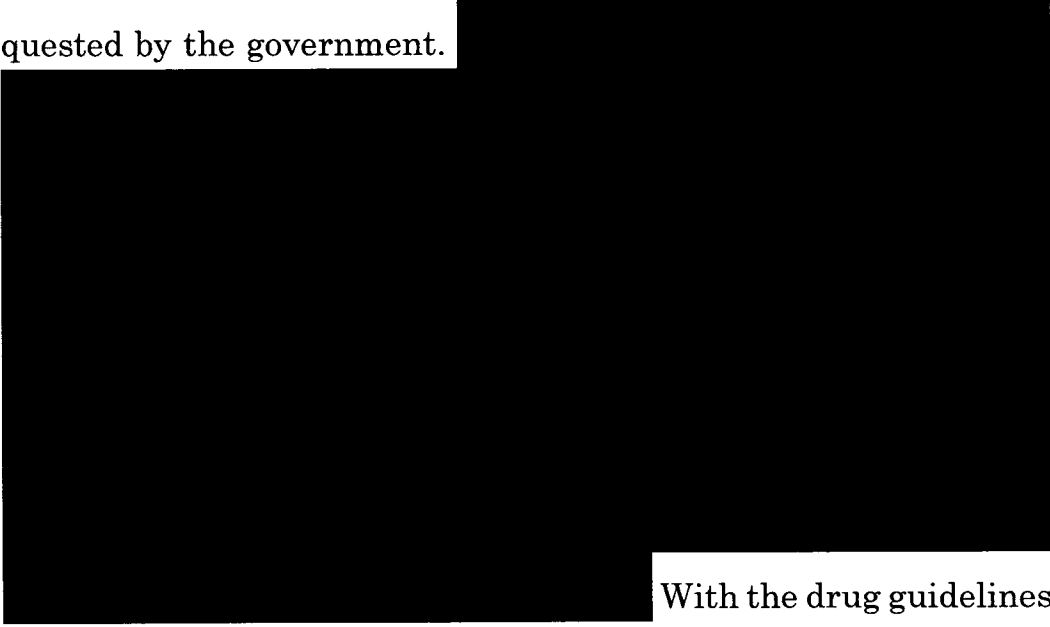
A § 3553(e) motion to sentence below a mandatory minimum allows the sentencing court to be free from any obligation to anchor its sentence to a mandatory minimum. *See In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013) (“granting the § 3553(e) motion freed the district court to use the guideline range and disregard the mandatory minimum”). Instead, the court must impose a sentence “in accordance with the guidelines and policy statements issued by the Sentencing Commission[.]” § 3553(e). Section 3553(e) does not limit this consideration to only guideline §5K1.1 departure factors. *See Reply Brief for Petitioners 4–13, Koons v. United States*, No. 17-5716, 2018 WL 1326150 (U.S. 2018) (textual, legislative, and policy arguments against limiting a court’s ability to consider all relevant guidelines, not just guideline §5K1.1 factors). Rather,

“§ 3553(e) states that the ‘sentence’ shall be imposed in accordance with the Guidelines and policy statements, not that the ‘departure’ shall occur, or shall be authorized, in accordance with the Guidelines and policy statements.” *Melendez v. United States*, 518 U.S. 120, 129 n.9 (1996).

Thus, once the government has waived the statutory mandatory minimum term, it is no longer the “sentencing range” in the case, and a § 3582(c) sentence reduction is possible if the court considered the lower guidelines range in imposing the sentence. See *Freeman v. United States*, 564 U.S. 522, 526 (2011) (plurality opinion) (“There is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range.”); *Sealed Case*, 722 F.3d at 368 (“[W]ithout the bar of the mandatory minimum, no provision kept Amendment 750 from having ‘the effect of lowering’ the appellant’s applicable guideline range, leaving the appellant eligible under the policy statement to pursue a sentence reduction.”).

Petitioner’s case is an appropriate vehicle to address this question because the initial drug guidelines range was part of the district court’s framework when it imposed the 198-month sentence. The court acknowledged that Petitioner was requesting a sentence

of 135 months, the bottom of that lower drug guidelines range. And the court imposed a sentence below the 216-month sentence requested by the government.



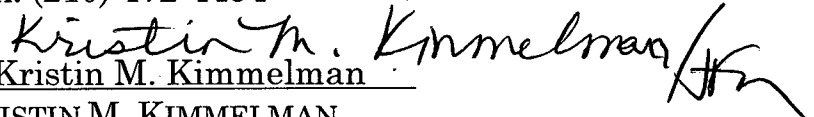
With the drug guidelines in mind, as well as Petitioner's lesser role in the offense as compared to his uncle, the court imposed the sentence. This falls short of a "clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines." *Hughes v. United States*, 138 S. Ct. 1765, 1776 (2018).

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454


s/ Kristin M. Kimmelman
KRISTIN M. KIMMELMAN
Assistant Federal Public Defender

Attorney for Defendant-Appellant

DATED: March 19, 2019