No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STIRLING MICHAEL HEATON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1).

In § 3582(c)(2) proceedings to modify a federal sentence in light of a retroactive amendment to the United States Sentencing Guidelines, does the sentencing court have discretion to adjust to the modified federal sentence in order to achieve concurrency with another criminal sentence?

LIST OF PARTIES

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IN THE
SUPREME COURT OF THE UNITED STATES

STIRLING MICHAEL HEATON,
Petitioner,

v.

UNITED STATES OF AMERICA,
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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Stirling Heaton requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The decision of the Eighth Circuit Court of Appeals is published at *United States v. Heaton,* 918 F.3d 596 (8th Cir. 2019), and the original slip opinion is reprinted in the Appendix to this Petition. (App. A).

JURISDICTION

Petitioner was charged by indictment filed in the United States District Court for the District of Minnesota. After having reached a plea agreement, Petitioner entered a guilty plea and the matter proceeded to its sentencing phase. The district court imposed a term of imprisonment which accounted for determinations under the United States Sentencing Guidelines—including a Guidelines adjustment to fashion a federal sentence that was concurrent to a related-conduct state sentence.

In 2014, the United States Sentencing Commission promulgated an amendment to the federal guideline used to determine Petitioner's original sentence, and also made the amendment retroactive. Petitioner then moved for a sentence reduction under 18 U.S.C. § 3582(c)(2). The district court granted the motion, and imposed a modified sentence. In crafting this modified sentence, the district court made an adjustment to achieve the same concurrency result as had been instituted in the original sentence. (App. B at 5-9).

The Eighth Circuit Court of Appeals reversed by published opinion dated March 20, 2019, *United States v. Heaton,* 918 F.3d 596 (8th Cir. 2019). (App. A, slip op.). This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition involves provisions of the Sentencing Reform Act and United States Sentencing Guidelines, including—

* * *

18 U.S.C. § 3582

Imposition of a sentence of imprisonment

* * * *

(c) Modification of an imposed term of imprisonment.—

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

* * * *

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

* * *

18 U.S.C. § 3584

(a) Imposition of concurrent or consecutive terms.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

* * *

* * *

U.S.S.G. § 1B.10

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.

* * * *

(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.

* * *

INTRODUCTION

Petitioner asks this Court to review a decision by the Eighth Circuit Court of Appeals involving § 3582(c)(2) proceedings to modify a federal sentence in light of a retroactive amendment to the applicable United States Sentencing Guidelines. The Eighth Circuit's decision prevents a sentencing court from making an adjustment to a § 3582(c)(2) modified sentence in order to achieve a federal sentence that runs concurrent to another sentence. This is so, even when that same credit had been granted at original sentencing. Other federal appellate courts have resolved the question in a markedly different manner. The Question Presented is thus an important and recurring one, that has generated conflict amongst the federal appellate courts. Thus, Petitioner requests that this Court exercise its discretion to review the decision below.

STATEMENT OF THE CASE

A. Federal charge and plea agreement

In 2012, Petitioner was charged by indictment filed in the federal district court below, alleging a racketeering-conspiracy offense, 18 U.S.C. § 1962(d), with the alleged objects being a number of federal controlled substance offenses, 21 U.S.C. §§ 841 & 846 ("Federal Case"). (App. B at 2-3).

At the time the Federal Case had been initiated, Petitioner had already been convicted and sentenced in state court ("State Case"). Importantly, the conduct underlying the State Case substantially overlapped with the factual allegations forming the basis for the Federal Case. (App. B at 2-3).

Returning to the Federal Case, Petitioner reached a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) ("Type-C agreement").[1] As reflected in the agreement and ultimately ratified by the district court, Petitioner's offense level and advisory sentencing range under the Sentencing Guidelines were substantially determined by USSG § 2D1.1—the guideline used in criminal cases involving illicit drug commerce. And under this provision, the district court found an advisory guidelines range suggesting a term of imprisonment from 130 to 162 months. (App. B at 2-3).

In addition, the district court ratified application of USSG § 5G1.3(b), which calls for an adjustment to achieve concurrent sentencing when the federal defendant is presently serving a related-conduct state case sentence.[2] (App. B at 2-3). For example, when the federal charge at hand involves illegal sale of controlled substances, and the federal defendant is already serving a state sentence flowing from that same course conduct. USSG § 5G1.3(b)(1) & App. N. 2(D). This was the situation the district court encountered in Petitioner's case. (App. B at 2-3).

Hence, in fashioning the original Federal Case sentence, the district court used as its initial benchmark the 130 to 162 month range derived from § 2D1.1. The district court then made a number of upward and downward adjustments, based upon non-

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[1] This Court has used the quoted shorthand phrase in referring to this type of agreement, most recently in *Hughes v. United States*, 138 S. Ct. 1765, 1776 & 1778 (2018). The cited provision binds a sentencing court to an agreed-upon sentence or sentencing range, should the district court deem the agreement acceptable.

[2] To describe this situation, the Guidelines employ the term "relevant conduct," which broadly encompasses all acts "committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" in the federal case at issue. USSG § 1B1.3(a)(1)(A). The § 5G1.3(b) concurrent-sentencing mandate will apply when an other-jurisdiction sentence stems from the same course of conduct, which is also at issue in a successive federal case. *See, e.g., Witte v. United States*, 515 U.S. 389, 404-05 (1995).

Guidelines considerations (*i.e.,* sentencing variances). And last, the district court made a § 5G1.3(b) downward adjustment of 18 months, reflecting time already served on the related-conduct State Case sentence. The end result was an imposed prison term of 115 months. This was how the Federal Case was initially resolved.

B. Retroactive Guidelines amendment and § 3582(c)(2) motion

In 2014, the Unites States Sentencing Commission promulgated Amendment 782 to the federal Guidelines. USSG, App. C, Am. 782 (2014). Amendment 782 made downward adjustments to the Drug Quantity Table of USSG § 2D1.1—the very same provision which drove Petitioner's Guidelines range as shown earlier. Because the downward adjustments were made retroactive, USSG, App. C, Am. 788 (2014), the amendment offered the prospect of sentencing relief to federal prisoners such as Petitioner.

Under retroactive Amendment 782, Petitioner's base offense level dropped by 2 levels, as did his total offense level. This, in turn, reduced Petitioner's advisory Guidelines sentencing range to a term of imprisonment from 110 to 137 months. (App. B at 8 n.4 & App. A at 3).

Petitioner brought a motion for downward modification of his federal sentence under 18 U.S.C. § 3582(c)(2), which permits such action when the movant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The district court determined that Petitioner was eligible for relief under this standard.[3] And so the

[3] Given the terms of the plea agreement and the original sentencing rationale expressed by the district court above, Petitioner's sentence was "based on" a subsequently lowered Sentencing Guideline. *See*

court proceeded to the second phase of the inquiry, *i.e.*, crafting a modified sentence that is "consistent with applicable policy statements issued by the Sentencing Commission."[4] *Id.*

The relevant policy statement is found at USSG § 1B1.10, which instructs a sentencing court to "determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines . . . had been in effect at the time the defendant was sentenced." *Id.* § 1B1.10(b)(1). The provision goes on to instruct that a sentencing court "substitute only the amendments . . . for the corresponding guideline provisions that were applied when the defendant was sentenced" but "leave all other guideline application decisions unaffected." *Id.* And later, the policy statement instructs sentencing courts to refrain from imposing a modified term "that is less than the minimum of the amended guideline range determined" under the above-quoted provision. *Id.* § 1B1.10(b)(2)(A).

Here, the district court construed these rules to permit a modified sentence that conformed to the post-Amendment 782 Guideline range. And also taking into account the original adjustment used to achieve concurrent sentencing with respect

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Hughes v. United States, 138 S. Ct. 1765, 1776 & 1778 (2018) (district court acceptance of Type-C plea agreements generally requires determination of Guidelines range as starting point and basis for ultimate sentence) & ("relief under § 3582(c)(2) should be available to permit the district court to reconsider a prior sentence to the extent the prisoner's Guidelines range was a relevant part of the framework used to accept the agreement or determine the sentence"). The district court thus correctly determined that Petitioner was eligible for a reduction under § 3582(c)(2). (App. B at 3-5).

[4] Strictly speaking the statute calls for a two-step inquiry to determine the modified sentence: (1) consider the plenary sentencing factors laid out in 18 U.S.C. § 3553(a); and (2) determine whether the reduction under consideration "is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); *accord Dillon v. United States*, 560 U.S. 817, 826 (2010). Only the second step is at issue here.

to the related-conduct state sentence. The court's rationale may be summarized this way:

	Original Sentence	Modified Sentence
Guideline Range USSG § 1B1.1(a)(7)	130 to 162 months	110 to 137 months
Concurrent Sentence Adjustment USSG § 1B1.1(8) & § 5G1.3	-18 months	-18 months
Adjusted Guideline Range:	**112 to 144 months**	**92 to 119 months**

(App. B at 8 & n.4).

That is to say, the district court determined the mandatory § 5G1.3 concurrent-sentence adjustment "forms part of a defendant's Guidelines range" such that a sentencing court "must consider it upon a motion for a sentence reduction under § 3582(c)." (App. B at 7). Hence, under the district court's rationale, the lowest sentence to be imposed in conformity with § 1B1.10(b)(2)(A) would be 92 months. (*Id.*). The district court proceeded to impose a modified prison term of 98 months, within the adjusted range specified above. (App. B at 9).

C. Decision by Court of Appeals

The decision was appealed to the Eighth Circuit Court of Appeals, which reversed based upon its interpretation of the federal sentencing statutes/guidelines, as well as the inherent authority of federal courts with respect to concurrent/consecutive sentencing.

1. Sentencing Reform Act & judicial sentencing authority

The statutes and guidelines used by the Court of Appeals to arrive at its decision all stem from the 1984 Sentencing Reform Act (SRA), Pub. L. 98-473, Ch. 2 (1984) (codified as amended in scattered sections of United States Code). In

particular, the provisions addressing: (a) retroactively applicable amendments to the federal Sentencing Guidelines; and (b) adjustments to achieve a federal sentence that is concurrent or consecutive to some other criminal sentence.

(a). Retroactive amendments to the Guidelines

The SRA established the United States Sentencing Commission, endowed with powers which are crucial to the modern system of federal criminal sentencing. 28 U.S.C. Ch. 58. For example, the Sentencing Commission is tasked with promulgating the federal Sentencing Guidelines, 28 U.S.C. § 994(a), periodically reviewing and revising those same guidelines, *id.* § 994(o), and specifying the circumstances under which federal prisoners may obtain sentencing relief based upon downward-amended guidelines, *id.* § 994(u).

Related to that last point, the SRA enacted 18 U.S.C. § 3582(c)(2) at issue here. This provision permits a federal court to "reduce the term of imprisonment" of any prisoner whose federal sentence has been "subsequently lowered by the Sentencing Commission" so long as the "reduction is consistent with the applicable policy statements issued by the Sentencing Commission." The "applicable policy statement" is to be found at USSG § 1B1.10, the first version of which appeared in 1989. USSG, App. C, Am. 306 (1989). Since that time, § 1B1.10 has been revised on numerous occasions, including a 2011 amendment, USSG, App. C, Am. 759 (2011), which added language to the effect that a sentencing court which is considering a § 3582(c)(2) motion should not impose a term "less than the amended guideline range." USSG § 1B1.10(b)(2)(A).

The 2011 commentary explains that the prior rule designed to account for Guidelines departures and variances had proved "difficult to apply" and "prompted litigation," and for this reason the Sentencing Commission enacted the new rule to deny modification to account for either. USSG, App. C, Am. 759 (2011). The Commission said: "The limitation that prohibits a deduction below the amended guideline range in such cases promotes conformity with the amended guideline range and avoids undue complexity and litigation." *Id.*

This same applicable language remains to this day. But lower courts must also harmonize that language with other provisions of the SRA, as well as traditional and inherent sentencing authority of federal courts described next.

(b). Concurrent/consecutive sentencing options

Beyond creation of the Sentencing Commission, the SRA also touched upon a number of topics relating to federal sentencing, such as concurrent or consecutive sentencing. In this regard, Congress opted to grant substantial discretion to sentencing courts with respect to a defendant "who is already subject to an undischarged term of imprisonment." 18 U.S.C. § 3584(a). In such cases, said Congress, "the terms may run concurrently or consecutively." *Id.*

The Sentencing Commission later promulgated USSG § 5G1.3(b), which also applies when the federal defendant is subject to an undischarged prison term, and the latter results from an offense "that is relevant conduct to the [federal] offense of conviction." In such cases, the district court "shall" adjust the federal sentence to

account for time already served upon that other-jurisdiction sentence.[5] USSG § 5G1.3(b)(1) & (2).

In addition, federal sentencing courts retain substantial discretion to craft a federal sentence aimed at achieving a concurrent sentencing effect, even in situations not covered by § 3584(a) or § 5G1.3(b). For example, this Court has held that a federal district court retains discretion to craft a sentence designed to achieve a concurrent or consecutive effect with respect to a state sentence that has yet to be imposed. *Setser v. United States*, 566 U.S. 231, 236 (2012). This authority flows not from the SRA, said this Court, but rather from traditional discretion and sentencing authority of federal district courts: "Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." *Id.*

In the decision below, the Eighth Circuit was called upon to reconcile these legal concepts to decide whether the district court had authority to make the adjustment that it did, in order to achieve a modified sentence that remained concurrent with the related-conduct state sentence. It did so in the following manner.

[5] Before applying the adjustment, a sentencing court is also to determine that the federal offense at issue was not committed while the defendant was serving the other term of imprisonment, and that the federal Bureau of Prisons will not credit the time already served on the related-conduct sentence. USSG. § 5G1.3(a) & (b). It is undisputed that both criteria are met in this case.

2. Reasoning of court below

To resolve the case at hand, the Eighth Circuit trained its focus upon the language chosen by the Sentencing Commission as set forth in the current form of USSG § 1B1.10. And the court accorded this language primacy over the above legal principles governing a sentencing court's authority to craft a federal sentence that is designed to achieve a concurrent effect with regard to some other sentence. (App. A).

The Eighth Circuit examined § 1B1.10(b)(2)(A), which states that when re-sentencing a defendant under retroactively revised guideline, the district court is not to impose "a term that is less than the minimum of the amended guideline range." The court reasoned the "amended guideline range" should be found with reference to USSG § 1B1.1(a)(7)—which instructs a court to determine a "guideline range" by finding the new offense level and corresponding new range established by the Sentencing Table found in USSG Ch. 5, Pt. A—and not USSG § 1B1.1(a)(8). Section 1B1.1(a)(8) is the mechanism by which any adjustments in Parts B through G of Chapter 5 are incorporated, and thus includes the § 5G1.3(b) adjustment the district court applied originally in order to achieve a concurrent sentence.[6] (App. A at 2-3) In other words, the Eighth Circuit concluded that a § 5G1.3(b) adjustment is not part of calculating the Guideline range. (*Id.*)

In sum, then, the Eighth Circuit held that the district court was incorrect to incorporate the previously employed Chapter 5 adjustment into the "amended

[6] A number of these analytical steps are not made explicit in the opinion below, but rather are expressed in truncated form. Instead, the Eighth Circuit incorporated its prior decision *United States v. Helm,* 891 F.3d 740 (8th Cir. 2018), which *does* explicate all of these steps in longer form.

guideline range." In terms of the table laid out earlier, the Eighth Circuit held the analysis should be:

	Original Sentence	**Modified Sentence**
Guideline Range USSG § 1B1.1(a)(7)	130 to 162 months	110 to 137 months
~~Concurrent Sentence Adjustment USSG § 1B1.1(8) & § 5G1.3~~	~~-18 months~~	~~-18 months~~
~~**Adjusted Guideline Range:**~~	~~**112 to 144 months**~~	~~**92 to 119 months**~~

And under § 1B1.10(b)(2)(A), said the court, this would mean the minimum allowable modified sentence would be 110 months. Not the 98 months imposed by the district court in order to continue to make the federal sentence and the related state sentence concurrent, as the district court had done at the original sentencing.

Nor could a district court achieve the desired concurrent-sentence result by way of its inherent sentencing authority, *see Setser*, 566 U.S. at 236, according to the Eighth Circuit. In particular, the court of appeals below considered whether a sentencing court might make a concurrent-sentence adjustment by taking the § 3582(c)(2) statutory authority to "reduce the term of imprisonment," and deeming a portion of that "term of imprisonment" as already having been served via the partially completed state sentence. The Eighth Circuit categorically ruled out the use of inherent judicial sentencing authority to achieve concurrency, holding: "The phrase 'term of imprisonment' does not include time served in state custody." (App. A at 3).

Under the reasoning of the court below, then, a federal sentencing court is foreclosed from fashioning a modified sentence under § 3582(c)(2) in order to continue to make that sentence concurrent with another sentence. (App. A). Other federal

appellate courts disagree, however, and this is why Petitioner seeks this Court's review here.

REASONS FOR GRANTING THE PETITION

I. The decision below encapsulates a conflict amongst lower courts.

In deciding whether to grant discretionary review, this Court frequently considers whether federal circuits have issued conflicting opinions with respect to the legal question presented. S. Ct. R. 10(a). As to the Question Presented here, there is just such a conflict.

As already described—and as demonstrated by the decision below (App. A) and *United States v. Helm*, 891 F.3d 740 (8th Cir. 2018)—the Eighth Circuit prohibits a sentencing court from imposing a modified sentence that once again achieves the desired concurrent sentence. At least under the current version of USSG § 1B1.10, and to the extent the desired concurrent sentence would reduce the modified sentence below the "amended guideline range." And, according to the Eighth Circuit's reasoning, this limitation trumps the traditional authority of sentencing courts to fashion a sentence which would achieve the aimed-for concurrency. This last proposition, it bears mentioning, conflicts with this Court's explication of inherent judicial sentencing authority, as stated in *Setser*, 566 U.S. at 236.

Other federal circuits have reached a conflicting result by putting a different gloss upon the requirements of § 1B1.10. For example, the Eleventh Circuit has held the "amended guideline range" should not be found simply by determining the new base offense level and finding the corresponding range on the sentencing table, as indicated by USSG § 1B1.1(a)(7). Rather, certain Chapter 5 adjustments—such as

the § 5G1.3 concurrent-sentencing adjustment at issue here—must be accounted for after arriving at the "amended guideline range." *United States v. Gonzalez-Murillo*, 852 F.3d 1329, 1335-39 (11th Cir. 2017). When a § 5G1.3 adjustment is applied at the original sentencing, says the Eleventh Circuit, a corresponding adjustment must be made to the "amended guideline range." *Id.* at 1340. It should be observed that this was the approach pursued by the district court in the case at hand, and which the Eighth Circuit reversed. (App. B).

And finally, there is the approach taken by the Ninth Circuit as seen in *United States v. Brito*, 868 F.3d 875 (9th Cir. 2017). There, the § 3582(c)(2) movant sought a modified sentence below the amended guideline range, to preserve the district court's decision at the original sentencing to make the federal sentence concurrent with a related state sentence. The district court believed it lacked authority to fashion such sentences, but the Ninth Circuit disagreed. The Ninth Circuit looked at the phrase "term of imprisonment" in both § 3582(c)(2) and § 1B1.10, and held that a sentencing court was permitted to "count time already served in state custody as part of the 'term of imprisonment.'" *Id.* at 882. In essence, the Ninth Circuit held that it was appropriate for sentencing courts to use traditional and inherent judicial authority to grant "credit" for related-case prison time "already served in state custody." *Id.* at 881. And in this regard, the *Brito* decision accords with this Court's prior decisions holding that judges have a broad inherent power to run a federal sentence concurrent to another sentence, even what that other sentence has not yet been imposed. *Setser*, 566 U.S. at 236.

In sum the Question Presented has generated conflict among the circuit courts of appeal. And as discussed next, the question is an important one that is certain to recur and generate yet more splits of authority.

II. The Question Presented is an important issue of law.

As already stated, a core function of the SRA was the creation of the Sentencing Commission and federal Sentencing Guidelines, both of which were designed to play a powerful role in federal criminal sentencing. 28 U.S.C. Ch. 58. And the SRA built in certain mechanisms for retroactive relief should any particular Guideline prove flawed, or systematically generate overly severe penalties. *See* S. Rep. 98-225 at 121 (1983). This is why § 3582(c)(2) and USSG § 1B1.10 were created

The Sentencing Commission has found cause to apply this authority on numerous occasions over the years, as demonstrated by the lengthening list of retroactive amendments found in § 1B1.10(d). The last of these—Amendment 782—is at issue in this case. And this particular retroactive amendment has had an especially powerful impact upon the federal criminal justice system.

According to the Sentencing Commission, Amendment 782 alone has resulted in sentence reductions for over 30,000 federal prisoners. *See* U.S. Sent. Comm'n, *2014 Drug Guidelines Amendment Retroactivity Data Report*, Table 1 (Aug. 2018). What's more, it has benefited prisoners sentenced over a remarkably long period of time—from the amendment's effective date, extending all the way back to 1989 when the Guidelines were new. *Id.*, Table 3.

There can be little question, then, that federal prisoners will continue to invoke Amendment 782 to seek reduced sentences. And if not Amendment 782, then some

future retroactive guidelines amendment, as history shows the Sentencing Commission is willing and able to take such action when supported by empirical data and the benefit of judicial experience. *See* USSG § 1B1.10(d). As the aforementioned decisions demonstrate, a great many of these current or future § 3582(c)(2) sentence-modification cases will involve thorny questions as to the circumstances under which the defendant may be granted credit for a sentence served elsewhere, for the same or related conduct. A pronouncement by this Court will thus supply needed clarity in countless current and future § 3582(c)(2) proceedings.

And, it bears emphasizing, the question cannot be resolved with a simple amendment to USSG § 1B1.10. As an initial matter, the current rule has been in place for approximately eight years, with no signs of changed course. But even if the Sentencing Commission did decide to amend § 1B1.10 to specifically permit concurrent-sentence adjustments for a time, it would be at the exclusive prerogative of an administrative agency. And any such amendment might well be short-lived, as suggested by the Commission's frequent changes to § 1B1.10.

Under the Eighth Circuit's approach, federal prisoners seeking § 3582(c)(2) relief would receive far different treatment based entirely upon the policy choices of administrative officials who happen to be in office at the time. But traditionally, the question of whether to craft a concurrent or consecutive sentence has rested with Article III judges, not administrative officials—a principle illustrated by this Court's decision in *Setser*. Meanwhile, every prisoner under the jurisdiction of the Ninth Circuit will always get a judicial officer's full discretionary consideration as to whether a modified sentence ought to run concurrently with some other sentence,

notwithstanding the ever-changing policy movements directed by Executive Branch officials.

Thus, no matter what current or future rules the Sentencing Commission adopts, this Court's action to resolve the conflict would lend a degree of clarity that is very much needed, both now and for the future.

III. This case presents an excellent vehicle for this Court's consideration as to the Question Presented.

As the earlier discussion demonstrates, federal appellate courts have taken a number of approaches to resolving the problem of granting credit in § 3582(c)(2) proceedings, to make a federal sentence run concurrent to some other criminal sentence. The Eleventh Circuit has worked within the existing Guidelines framework, permitting a § 5G1.3 adjustment that had been granted at original sentencing. *Gonzalez-Murillo*, 852 F.3d at 1335-39. The Ninth Circuit has paired the statutory "term of imprisonment" language with a district court's broad sentencing discretion, so as to grant the desired credit outside the Guidelines framework entirely. *Brito*, 868 F.3d at 881-82. And in the case at hand, the Eighth Circuit has explicitly rejected both of these approaches, instead opting for post-amendment sentencing that hews tightly to whichever Guidelines policy statement is in place at a given time. (App. A). This last approach strips a district court of its broad inherent power to make a federal sentence concurrent with another sentence.

It is the Eighth Circuit decision at issue here, then, that presents the best vehicle for this Court to resolve the Question Presented. The decision below encapsulates not only its own approach to the problem, but all the competing

approaches as well. The decision below presents this Court with a prime opportunity to explore these competing approaches as to the question of the scope of a district court's authority to fashion a sentence in § 3582(c)(2) proceedings, that achieves the desired effect of making a federal sentence concurrent with another sentence imposed by some other court.

In sum, the Question Presented is an important legal issue, affecting a great many current and future federal prisoners. The question has generated markedly different approaches amongst the United States appellate courts. And the question is well-framed by the Eighth Circuit's decision below. For all of these reasons, Petitioner asks that the Court grant discretionary review here.

CONCLUSION

For all these reasons, Petitioner asks the Court to grant review of the decision below.

Dated: June 18, 2019

Respectfully submitted,

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APPENDIX

Appendix A

Decision of court of appeals below
(slip op. issued March 20, 2019)
(also reported at 918 F.3d 596 (8th Cir. 2019))

United States Court of Appeals
For the Eighth Circuit

No. 17-3314

United States of America,

Plaintiff - Appellant,

v.

Stirling Michael Heaton,

Defendant - Appellee.

Appeal from United States District Court
for the District of Minnesota - St. Paul

Submitted: October 15, 2018
Filed: March 20, 2019

Before WOLLMAN, COLLOTON, and BENTON, Circuit Judges.

COLLOTON, Circuit Judge.

The government appeals an order of the district court reducing Stirling Heaton's term of imprisonment in light of Amendment 782 to the United States Sentencing Guidelines. Consistent with *United States v. Helm*, 891 F.3d 740 (8th Cir. 2018), we conclude that the district court impermissibly reduced Heaton's sentence below his amended guideline range, so we reverse and remand for resentencing.

APPENDIX A-1

Heaton pleaded guilty in 2012 to a conspiracy to participate in racketeering activity, and the district court sentenced him to 115 months' imprisonment. The court arrived at the sentence by first calculating an advisory guideline range of 130 to 162 months' imprisonment, based on a total offense level of 28 and a criminal history category V, and choosing a sentence of 136 months within that range. Applying USSG § 5G1.3(b)(1), the court then adjusted the sentence downward by 18 months, based on time that Heaton had served in state custody on an undischarged term of imprisonment for an offense that was relevant conduct to the federal offense. The court reduced the term by another three months under 18 U.S.C. § 3553(a) to account for "good time credit" that Heaton could have earned in federal custody for the 18 months served in state custody. Accordingly, the court imposed a final sentence of 115 months' imprisonment.

In 2014, the Sentencing Commission promulgated Amendment 782, which reduced the offense level for many drug-related offenses. *See* USSG App. C, Amend. 782 (2014). Because the underlying offenses for Heaton's racketeering conspiracy involved drug trafficking, and thus triggered application of the drug trafficking guideline, *see* USSG § 1B1.2(a), the amendment reduced Heaton's base offense level by two, from 26 to 24, and his total offense level from 28 to 26. *Compare* USSG § 2D1.1(c)(7) (2011), *with* USSG § 2D1.1(c)(8) (2014).

Heaton then moved to reduce his sentence under 18 U.S.C. § 3582(c)(2). That provision allows a court to reduce a defendant's term of imprisonment based on a retroactive amendment to the guidelines, if the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). One such policy statement forbids a court (with an exception not applicable here) to "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*." USSG § 1B1.10(b)(2)(A) (emphasis added).

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The district court granted Heaton's motion and reduced his sentence to 98 months' imprisonment. The court reasoned that Heaton's "amended Guidelines range" was 92 to 119 months. The court calculated an "initial Guidelines range" of 110 to 137 months, based on a new total offense level of 26 and criminal history category V, and then subtracted the 18-month adjustment under USSG § 5G1.3(b)(1) for time served in state custody. After considering the factors set forth in 18 U.S.C. § 3553(a), the court arrived at a sentence of 98 months.

The government argues on appeal that the "amended guideline range" for Heaton was 110 to 137 months' imprisonment, and that the court erred by reducing Heaton's term below 110 months. For reasons explained in *Helm*, we agree. The guideline range corresponds to the defendant's offense level and criminal history category. Section 5G1.3(b) does not enter into the calculation of an amended guideline range. 891 F.3d at 742-43. Therefore, Heaton's "amended guideline range" was 110 to 137 months' imprisonment. Any reduction below 110 months was inconsistent with the policy statement in USSG § 1B1.10(b)(2)(A) and thus unauthorized by 18 U.S.C. § 3582(c)(2).

Heaton argues that the sentence was consistent with § 1B1.10, because his "term of imprisonment" includes the 18 months that he served in state custody. On that view, his term was not 98 months, but 116 months. *See United States v. Brito*, 868 F.3d 875, 881 (9th Cir. 2017). In our view, the text of § 1B1.10(b)(2)(A) cannot bear this interpretation. *See id.* at 883-84 (McKeown, J., dissenting). The phrase "term of imprisonment" in § 1B1.10(b)(2)(A) refers to the same phrase in 18 U.S.C. § 3582(c)(2). Section 3582(c)(2), in turn, applies to "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," and allows the federal court to reduce that "term of imprisonment." 18 U.S.C. § 3582(c)(2) (emphasis added). The phrase "term of imprisonment" does not include time served in state custody. A defendant in federal court has not "been sentenced to" a term in state

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custody "based on a sentencing range" under the federal sentencing guidelines. A federal district court does not impose state sentences or reduce state terms of imprisonment.

Heaton argues alternatively that § 1B1.10 is unconstitutional if it limits a sentence reduction to the bottom of the amended guideline range. He asserts that it is irrational for the guidelines to permit a "full" reduction under § 3582(c) for a defendant who serves concurrent sentences in federal custody, but to deny the same reduction to a defendant who served some of his time in state custody. We are not convinced that the Commission's guideline lacks any rational basis. The Commission has observed that prohibiting a reduction below the amended guideline range "promotes conformity with the amended guideline range and avoids undue complexity and litigation." USSG App. C, Amend. 759 (2011). Line-drawing problems are inevitable under the guidelines. As we noted in *Helm*, for example, the policy statement has the effect of treating discharged and undischarged sentences alike in § 3582(c) proceedings, whereas Heaton's approach has prompted objections to a distinction in treatment on that score. *See United States v. Gonzalez-Murillo*, 852 F.3d 1329, 1342-43 (11th Cir. 2017) (Rosenbaum, J., concurring). The Commission might have chosen a more complex system of reductions under which a district court could account for adjustments under § 5G1.3, or even for variances based on hypothetical "good time credit" for time served in state custody. But it is not irrational for the Commission to avoid "undue complexity and litigation" by adopting a uniform limitation tied to the amended guideline range.

For the foregoing reasons, we vacate Heaton's sentence and remand for a resentencing consistent with the limitation that the sentence must not be less than the 110-month minimum of the amended guideline range.

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Appendix B

Memorandum opinion and order of district court,
(issued September 13, 2017)

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	Criminal No. 12-26(11) (JRT/JSM)
Plaintiff,	
v.	**MEMORANDUM OPINION AND ORDER GRANTING MOTION TO REDUCE SENTENCE**
STIRLING MICHAEL HEATON,	
Defendant.	

Michael L. Cheever, Assistant United States Attorney, **UNITED STATES ATTORNEY'S OFFICE**, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, for plaintiff.

Stirling Michael Heaton, Reg. No. 16286-041, Phoenix Federal Correctional Institution, 37910 North 45th Avenue, Phoenix, AZ 85086, *pro se* defendant.

Defendant Stirling Michael Heaton was originally sentenced to a term of imprisonment of 115 months pursuant to a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C) entered into by the parties and accepted by the Court. Heaton now moves for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on Amendment 782 to the U.S. Sentencing Guidelines Manual ("the Guidelines"), which retroactively lowers his advisory Guidelines range from 130-162 months to 110-137 months, before factoring in an 18-month adjustment for an undischarged state term under § 5G1.3(b)(1) of the Guidelines. For the reasons discussed below, the Court will grant Heaton's motion and reduce his sentence to 98 months.

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BACKGROUND

In 2012, Heaton was indicted for charges of conspiracy to commit racketeering, in violation of 18 U.S.C. § 1962(d), in connection with his membership in the "Native Mob" gang. (Indictment ¶¶ 3, 14, 22(v)-(x), Jan. 19, 2012, Docket No. 18.) On March 30, 2013, the parties attempted to enter a plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C), binding the Court to sentence Heaton to 124 months' imprisonment, premised on a total offense level of 27, with credit for time served in state custody. (Tr. of Sentencing Hr'g at 8-11, 15, June 8, 2016, Docket No. 1620.) The Court refused to accept the plea agreement, finding that the plea agreement improperly applied the Guidelines because Heaton in fact had a "total offense level of 28." (*Id.* at 6, 14-15.) The Court then determined the proper sentence for Heaton based on his Guidelines range: the Court "start[ed] at the bottom of the guideline range" with 130 months, then increased the sentence by 6 months for a "witness tampering issue," then reduced by 18 months to credit Heaton for the time served on an undischarged state sentence under § 5G1.3(b)(1), and finally imposed a 3-month downward variance for good time Heaton would not receive on the state term. (*Id.* at 14-15.) Based on these calculations, the Court found 115 months to be the "fair and reasonable sentence" and directed the parties change the plea agreement to 115 months or to "withdraw [the plea] and go to trial." (*Id.* at 15.)

Following a recess, the parties presented an edited Rule 11(c)(1)(C) agreement, which the government said, "corrected [the Guidelines] computations throughout" the agreement. (*Id* at 16.) As part of the process of accepting the agreement, Heaton affirmed that he understood the total offense level in the plea agreement increased from

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27 to 28, and the change resulted in a Guidelines range of 130 to 162 months, without the § 5G1.3 adjustment. (*Id.* at 18.) Thereafter, the Court accepted the plea agreement and imposed a sentence of 115 months after an adjustment for Heaton's related, undischarged state term pursuant to § 5G1.3. (*Id.* at 21; *see also* Final Approved Plea Agreement at 8 n.1, May 30, 2013, Docket No. 1236 (discussing Heaton's adjustment under § 5G1.3).)

18 U.S.C. § 3582(c)(2) provides that a criminal sentence may be retroactively reduced "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." In 2014, the Sentencing Commission approved Amendment 782 to the Guidelines. U.S.S.G. Suppl. to App. C, Amend. 782 (U.S. Sentencing Comm'n 2014). The amended Guidelines retroactively reduced the base offense level for Heaton's drug quantity from 26 to 24 and reduced his total offense level from 28 to 26.[1] On October 17, 2016, Heaton filed a motion to reduce his term of imprisonment based on Amendment 782 and 18 U.S.C. § 3582(c)(2).

DISCUSSION

I. ELIGIBILITY UNDER 18 U.S.C. § 3582(C)(2)

Fed. R. Crim. P. 11(c)(1)(C) provides that a "plea agreement may specify that an attorney for the government will . . . agree that a specific sentence . . . is the appropriate disposition of the case." If the Court accepts that plea agreement, the agreed upon

[1] Heaton's base offense level was calculated using the guideline for trafficking 100KG but less than 400KG of marijuana equivalent, (*see* Presentence Investigation Report ¶¶ 211-12 (on file with the Court)), which now carries a base offense level of 24, U.S.S.G. § 2D1.1(c)(8).

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sentence "binds the court." *Id.* When a defendant is sentenced pursuant to a binding Rule 11(c)(1)(C) plea agreement, the court retains discretion to reduce the sentence under § 3582(c)(2) **only** if the "agreement expressly uses a Guidelines sentencing range to establish the term of imprisonment, and that range is subsequently lowered by the [United States Sentencing] Commission." *Freeman v. United States*, 564 U.S. 522, 539 (2011) (Sotomayor, J., concurring).[2] For *Freeman* to apply, "[t]he plea agreement must do more than opaquely refer to concepts usually embodied in the Guidelines calculations." *United States v. Renfrow*, No. 15-3792, 2017 WL 781516, at *1 (8th Cir. Feb. 28, 2017). It must be "evident from the agreement itself, for purposes of § 3852(c)(2) the term of imprisonment imposed by the court in accordance with that agreement is 'based on'" the applicable sentencing range. *Freeman*, 564 U.S. at 539.

The Court finds Heaton's amended plea agreement meets this standard. The initial agreement included a Guidelines calculation and an advisory Guidelines range, and selected a sentence within that range. (Final Approved Plea Agreement at 6-9.) The Court refused to accept the agreement, finding it incorrectly applied the Guidelines. The parties were then given an option to revise the plea agreement to reflect the correct Guidelines range and the sentence that the Court found was appropriate based on that range. Accordingly, the Court finds that the amended agreement was "based on" the

[2] Justice Sotomayor's concurring opinion in *Freeman* sets forth the controlling standard because there was no majority opinion and her opinion "concurred in the judgment[] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); *see also United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012) ("It is Justice Sotomayor's concurring opinion in *Freeman* that is controlling and represents the holding of the Court.").

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applicable Guidelines and that Heaton is eligible for reduction of his term of imprisonment under 18 U.S.C. § 3582(c)(2).

II. AMENDED GUIDELINES RANGE AND U.S.S.G. § 5G1.3 ADJUSTMENT

Section 3582(c)(2) provides for sentence reductions "consistent with applicable policy statements issued by the Sentencing Commission." The policy statement applicable to reductions under § 3582(c)(2) is found in U.S.S.G. § 1B1.10. That policy statement directs the court to "determine the amended guideline range that would have been applicable" if the amendment had been in effect and "leave all other guideline application decisions unaffected." U.S.S.G. § 1B1.10(b)(1). The policy statement also states "the court shall not reduce the defendant's term of imprisonment under [§] 3582(c)(2) . . . to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection," unless the court previously imposed a term less than the Guidelines range "pursuant to a government motion to reflect the defendant's substantial assistance to authorities." *Id.* § 1B1.10(b)(2)(A)-(B). Accordingly, in many cases, the Court may not reimpose a downward departure or variance to below the amended Guidelines range when considering a § 3582(c)(2) sentence reduction, even if it had done so at the initial sentencing. *See, e.g., United States v. Grant*, No. 12-4107, 2014 WL 6792766, at *2 (N.D. Iowa Dec. 2, 2014) ("Because the court imposed a term of imprisonment outside the guideline range applicable to the defendant at the time of sentencing as a result of a downward variance, the court is unable to reduce the defendant's sentence.").

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The government argues that, applying § 1B1.10 of the Guidelines, the Court may not impose a sentence less than 110 months – the minimum of the amended Guidelines range, without taking into considering the 18-month adjustment Heaton received for his undischarged state term under § 5G1.3. However, at least one circuit court has found that courts must apply a § 5G1.3 adjustment when reducing a sentence under § 3582(c)(2). *See United States v. Gonzalez-Murillo*, 852 F.3d 1329, 1337 (11th Cir. 2017). In that case, the Eleventh Circuit found an adjustment under § 5G1.3(b)(1) of the Guidelines was not a departure or a variance and that its mandatory nature and placement within the Guidelines suggested that it formed part of the defendant's Guidelines range. *Id.* at 1336-39.

Additionally, Eighth Circuit precedent supports the idea that an adjustment under § 5G1.3 is considered part of the Guidelines range, and thus it must be considered during a sentence reduction under § 3582(c)(2). In *United States v. Carter*, the district court found a Guidelines range of 84 to 105 months prior to consideration of a mandatory 24-month adjustment under § 5G1.3(b)(1). 652 F.3d 894, 896 (8th Cir. 2011). But, considering the defendant's extensive criminal history, the district court sentenced the defendant to 105 months, even after recognizing that § 5G1.3(b)(1) applied. *Id.* The defendant appealed, arguing that the court erred by failing to apply the mandatory adjustment under § 5G1.3(b)(1). *Id.* The Eighth Circuit affirmed, finding that the record showed the district court took the mandatory § 5G1.3(b) adjustment into account, but then varied upwards (due to the defendant's criminal history) to the top of the sentencing range prior to the adjustment. *Id.* at 896-97. Because the Eighth Circuit described the

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105-month sentence as a "variance from the [G]uidelines," when the pre-adjustment Guidelines range was 84 to 105 months, it must have considered the Guidelines range to include the mandatory § 5G1.3(b)(1) adjustment. *Id.*; *cf. United States v. Tolliver*, 570 F.3d 1062, 1066 (8th Cir. 2009) (noting that a departure occurs when the court departs **from** the Guidelines range, not **to** the Guidelines range). Accordingly, the Court finds that a mandatory adjustment under § 5G1.3(b)(1) is not a variance or departure; instead, it forms part of a defendant's Guidelines range, and the Court must consider it upon a motion for a sentence reduction under § 3582(c).[3]

All records indicate that the Court credited Heaton for 18 months based on his undischarged state term under § 5G1.3(b), and thus, Heaton will receive that adjustment once again as part of determining his amended Guidelines range. But, the Court also granted Heaton a three-month **variance** based on his loss of good time, which would fall outside of the mandatory § 5G1.3(b) adjustment. Although the Court may consider the reasons for that variance in determining the proper sentence for Heaton after determining the applicable Guidelines range, the variance does not factor into the range within which the Court may sentence Heaton pursuant to § 3582(c)(2). The Court may therefore

[3] The Court acknowledges that this holding conflicts with dicta in a recent Eighth Circuit decision, *United States v. White*, 859 F.3d 569 (8th Cir. 2017). In that decision, the Eighth Circuit addressed whether a court could reimpose a departure under U.S.S.G. § 5K2.23 during a § 3582(c) sentence reduction and held only "that the court cannot reduce a defendant's term below the amended [G]uidelines range based on a downward departure for reasons other than substantial assistance." *Id.* at 572. The court went on to state that it would reach the same decision with regard to a § 5G1.3(b) reduction, *id.*; however, this discussion of § 5G1.3(b) was not necessary to the court's holding.

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sentence Heaton anywhere within the amended Guidelines range after factoring in the § 5G1.3 adjustment, which the Court finds to be 92 months to 119 months.[4]

III. STATUTORY SENTENCING FACTORS

Having determined that Heaton is eligible for a sentence reduction and the applicable Guidelines range, the Court must next examine the factors contained in 18 U.S.C. § 3553(a). *See* § 3582(c)(2) ("[T]he court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable.") The Court considers all of the statutory sentencing factors in reaching its decision. Among these, the Court finds paragraph "(3) the kinds of sentences available," paragraph "(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" to be particularly relevant. New defendants who commit the same crimes as Heaton will be sentenced based on the amended Guidelines, and therefore, it is appropriate to adjust Heaton's sentence to avoid the "unwarranted disparities" in sentencing that would result absent a sentence reduction. Furthermore, by reducing the offense level of Heaton's crime, the Sentencing Commission has shown a clear policy indicating that it is appropriate to subject defendants like Heaton to less severe sentences than those the Guidelines used to mandate. *See* § 3553(a)(5).

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[4] This is based on a new base offense level of 24, U.S.S.G. § 2D1.1(c)(8), a 2-level increase for possession of a firearm, § 2D1.1(b)(1), a 3-level increase for aggravated role, § 3B1.1(b), a 3-level reduction for acceptance of responsibility, § 3E1.1, resulting in a total offense level of 26. With Heaton's criminal history category of V, Heaton's new initial Guidelines range is 110 to 137 months. Thus, after factoring Heaton's 18-month adjustment under § 5G1.3(b)(1), the Court may sentence Heaton within the range of 92 to 119 months.

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In sum, because Heaton's plea agreement is based on the amended Guidelines, he is eligible for a sentence reduction under § 3582(c)(2). The Court will grant Heaton's motion to reduce his sentence. And, considering all statutory sentencing factors, the Court will reduce Heaton's sentence proportionately to six months higher than the bottom of his amended Guidelines range, resulting in a term of 98 months' imprisonment.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Heaton's Motion to Reduce Sentence [Docket No. 1641] is **GRANTED**. Heaton's sentence of imprisonment is reduced from a total term of 115 months to a total term of 98 months.

IT IS FURTHER ORDERED that all other terms and conditions of the Amended Judgment in a Criminal Case [Docket No. 1374], dated April 29, 2014, will remain in full force and effect.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 13, 2017
at Minneapolis, Minnesota.

s/John R. Tunheim
JOHN R. TUNHEIM
Chief Judge
United States District Court

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