No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

Stephanie A. Kearns
Brian Mendelsohn
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta St., N.W.
Suite 1500
Atlanta, GA 30303

E. Joshua Rosenkranz
Counsel of Record
Eric A. Shumsky
Thomas M. Bondy
Katherine M. Kopp
Alison M. Kilmartin
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Unlike previous petitions, this Petition presents a clean vehicle for deciding two critical, recurring questions over which the courts of appeals are hopelessly divided: (1) Whether *Marks v. United States*, 430 U.S. 188 (1977), means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other; and (2) Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman v. United States,* 564 U.S. 522 (2011), or, instead, by the separate concurring opinion with which eight other Justices disagreed.

The Government appears to agree with much of our Petition. It accepts that there is a circuit split, Opp. 17, and agrees that "further clarification of *Marks* might be necessary," Opp. 16. It concedes that Mr. Hughes falls into the "subset" of cases affected by the *Freeman* confusion. Opp. 15. And it does not contest that, should this Court reverse the decision below, Mr. Hughes is eligible for the sentence reduction he seeks (though it suggests that any reduction in sentence is, in its view, not "justified"). Opp. 17.

Instead of explaining why Justice Sotomayor's single-Justice concurrence warrants precedential import, however, the Government says that the issue does not matter because, in the Government's view, prosecutors can draft plea agreements to skirt around the issue—an argument that the Petition already refuted. Pet. 25-26. But there is no indication that prosecutors and defendants are generally entering into

such tailored plea arrangements or that such arrangements would generally be feasible.

The Government then argues that "the application of *Marks* to *Freeman* is straightforward," Opp. 16, and, in one sentence, dismisses the D.C. and Ninth Circuits as failing to properly understand the opinions in *Freeman*. That conclusory assertion only emphasizes the deep and entrenched split among the courts of appeals.

Moreover, the Government's application of *Marks* to *Freeman* is just plain wrong. Justice Sotomayor's concurrence in *Freeman* is not a "logical subset" of the plurality opinion and should not be treated as controlling precedent when every other Justice disagreed with that reasoning. This Court now has a clean opportunity to review the *Freeman* question and resolve the lower courts' confusion.

ARGUMENT

I. The Courts Of Appeals Are Irretrievably Divided, And The *Freeman* Question Is, And Will Continue To Be, Important.

This Court could not agree when it issued a 4-1-4 decision in *Freeman*, and the lower courts have fared no better in applying the disjointed ruling. The Government does not dispute that there is a 10-2 circuit split over whether the concurrence controls, but argues that "disagreement … about the application of *Freeman* is of limited significance" because it is "likely to be a relatively short-lived issue for the courts."

Opp. 14. One need only look at the long list of petitions filed on this issue to see that this is not the case. *See* Opp. 9, n.2 (identifying nine petitions seeking review of *Freeman*, excluding this one, filed since 2012).

1. Sentencing guideline revisions affect tens of thousands of defendants, *see* U.S.S.C., *Guidelines Manual 2016: Supp. to App'x C* 86 (Nov. 1, 2016), http://tinyurl.com/yb6qsmhp (estimating that "46,000 offenders may benefit from retroactive application of Amendment 782" alone), the vast majority of whom entered guilty pleas, U.S.S.C., *2015 Sourcebook of Federal Sentencing Statistics*, Figure C (2016), http://tinyurl.com/yble3job (97% of sentencing decisions arise in the context of a guilty plea). And the significance of the issue for affected individuals cannot be overstated. "[T]he average sentence reduction" for each prisoner eligible under Amendment 782 alone "would be approximately 18 percent." U.S.S.C., *Guidelines Manual, supra*, at 86.

The Government mistakenly argues that Mr. Hughes would not receive a sentence reduction "even if he were eligible for one" because his current sentence is within the amended range. Opp. 17. There is no prohibition on reducing a sentence that is already within the amended range. In fact, the Application Notes to Amendment 782 contemplate exactly this scenario and explain that "the court … may reduce the defendant's term of imprisonment" within the amended range. U.S.S.C., *Guidelines Manual 2016* 44-45 (Nov. 1, 2016), http://tinyurl.com/y6ulyxpk (Application of Subsection (b)(2)). And, as acknowledged in the Manual and by the Government itself, the precise extent of a reduction is best left to the district

court's discretion. *See* Opp. 19 ("'If the *district court* … concludes the [plea] agreement led to a more lenient sentence than would otherwise have been imposed, it *can* deny the motion'" for a sentence reduction.) (quoting *Freeman*, 564 U.S. at 532) (emphasis added). The Government cannot reliably predict whether the court would feel "justified" in further reducing Mr. Hughes's sentence. Opp. 17.

2. The Government further downplays the issue by asserting that prosecutors "can" draft plea agreements to make the issue go away. But there is no evidence that prosecutors actually *are* drafting plea agreements with the *Freeman* concurrence in mind. The Government has not refuted the point (made in the Petition, Pet. 25-26) that the stream of recent *Freeman* petitions demonstrates that plea agreements have not materially changed since *Freeman* was decided over six years ago. The Government cites one example of a U.S. Attorney's Office stating that it "'now drafts Rule 11(c)(1)(C) plea agreements with an eye to avoiding later litigation on the *Freeman* issue.'" Opp. 14 (quoting *United States v. Duvall*, 705 F.3d 479, 484 n.2 (D.C. Cir. 2013)). But that was not the case for Mr. Hughes, or Mr. Negron, or Mr. Gilmore, or Mr. Sullivan, or any of the thousands of federal prisoners who signed C-type plea agreements since *Freeman* that contain no language squarely addressing the defendant's eligibility for a future sentence reduction. For these defendants, the issue is real and the consequence is concrete.

One reason no one seems to be adopting the Government's proposed workarounds is that they do not solve the problem. The Government suggests that

prosecutors and defendants can just employ A-type or B-type plea agreements instead of C-type agreements. Opp. 14. But that is a non sequitur. The question here pertains to the impact of later sentencing guideline changes upon sentences imposed in light of C-type plea agreements. It is no answer for the Government to say that C-type agreements don't have to be used.

The Government also suggests that defendants can just agree to waive the right to seek relief in the event of a subsequent Guidelines amendment. Opp. 14. Maybe, in theory. But as a practical matter, as the Petition noted, it is unclear why defendants would generally agree to such a provision, and the Government conspicuously leaves that point unanswered.

The Government's third suggestion is that prosecutors and defendants can agree to insert into plea agreements clauses stating that the agreed-upon sentence is (or is not) "based on" a particular Sentencing Guidelines calculation. Opp. 14. That suggestion is problematic as well, because any purported benefit derived from such a change in drafting would presumably be limited to jurisdictions that accept the *Freeman* concurrence as controlling to begin with. A defendant in Georgia, for example, would be eligible for a sentence reduction if his lawyer and the prosecutor negotiated an agreement that employed explicit language noting that the plea was "based on" the Sentencing Guidelines. But a defendant in California could be eligible for a sentence reduction regardless of the terms of his written plea agreement, because the Ninth Circuit, like the D.C. Circuit, focuses on the

reasons underlying the judge's imposition of the sentence as opposed to the reasons underlying the parties' agreement.[1]

Relying on the drafting process to determine a defendant's future eligibility for a sentence reduction would also extend power to prosecutors to grant or withhold the opportunity for future sentence reductions—a power that Congress reserved for the courts. Plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system," *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (emphasis in original), and it should not be used to further strip defendants of their rights. The *Freeman* plurality rejected the notion that plea agreements should control the outcomes of these cases, explaining that such a solution would "permit the very disparities the Sentencing Reform Act seeks to eliminate." 564 U.S. at 533. Those "consequences" are "significant," *id.*; the solution cannot be to rely on the unsubstantiated promises the Government makes here.

II. This Case Is Also An Ideal Vehicle For Considering The *Marks* Question.

The *Freeman* question arises because this Court has never clarified the statement in *Marks* that the controlling opinion in a fractured decision is the one

---

[1] In addition, drafting around the concurrence in *Freeman* would require a high degree of specificity. Mr. Hughes's plea agreement made no fewer than six references to the Sentencing Guidelines, *see* Pet. 6, but none of those references—either individually or in combination—was deemed sufficient to qualify his sentence as "based on" the Guidelines. Pet. App. 14a-15a, 28a-30a.

that "concur[s] in the judgment on the narrowest grounds." 430 U.S. at 193 (internal citations omitted). *See also* Pet. 11-19. According to the Government, no clarification is needed: "'In splintered cases, there are multiple opinions precisely *because* the Justices did not agree on a common rationale.'" Opp. 13 (quoting *United States v. Duvall*, 740 F.3d 604, 613 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc)). That is incorrect.

Fractured decisions often contain some common rationale underlying the judgment. *See, e.g.*, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality affirmed court of appeals based on *Roth* plus two additional criteria, whereas concurrence would have affirmed based on *Roth* alone). The application of *Marks* is clear in those cases because the "narrowest ground" can be found in the common rationale. *Memoirs*, 383 U.S. 413 ("narrowest ground" was the *Roth* rule). Further clarification is needed, however, in cases like this one where the plurality and concurrence "agree on very little except the judgment." *Freeman*, 564 U.S. at 544 (Roberts, C.J., dissenting). In such a setting, there is "no practical middle ground between" the plurality and the concurrence, *United States v. Epps*, 707 F.3d 337, 348-49 (D.C. Cir. 2013), so no decision "can be meaningfully regarded as 'narrower,'" *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991). *See also* Pet. 12; *Freeman*, 564 U.S. at 526 (noting that "Justice Sotomayor would reverse the judgment on a *different* ground") (emphasis added).

The Government glosses over the *Marks* question, asserting that "[w]hen the Court has chosen to review

a dispute about the application of *Marks* to a fractured decision, … it has simply revisited the underlying question addressed in that decision rather than 'pursu[ing] the *Marks* inquiry to the utmost logical possibility.'" Opp. 16 (quoting *Nichols v. United States*, 511 U.S. 738, 746 (1994)). But that is precisely the problem. In cases presenting a potential vehicle for considering *Marks,* the Court has sidestepped the *Marks* question by focusing on the narrower question of how it applies to a particular fractured decision. But this approach means that the Court has repeatedly had to review petitions seeking to clarify the meaning of a specific, fractured decision. *See* Pet. 23-24. Clarifying *Marks* itself would help to resolve a wide range of legal questions. Pet. 19-20. It is simply not true that "[c]onsideration of the *Marks* issue here would … provide little guidance for the application of *Marks* in other … scenarios." Opp. 17. Clarification of *Marks* would be beneficial across the board for lower courts attempting to apply fractured decisions of this Court. Ryan C. Williams, *Questioning* Marks: *Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 799 (2017) ("The conceptual confusion surrounding *Marks* presents an important practical challenge for lower courts.").

When the Government does engage the *Marks* argument, it simply assumes its own conclusion by arguing that "the application of *Marks* to *Freeman* is straightforward," because "'it is clear that Justice Sotomayor's opinion controls.'" Opp. 16 (quoting Pet. App. 13a). That is the "model of circular reasoning" because "the premises of the argument feed on the conclusion." *Wesberry v. Sanders*, 376 U.S. 1, 25 (1964) (Harlan, J., dissenting). If the application of

Marks to *Freeman* were so "easy," Opp. 16 (quoting *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring in the denial of rehearing en banc)), there would not be two courts of appeals that apply *Marks* to *Freeman* in a different way and with completely different results than the others. Instead, the Government conclusorily dismisses the Ninth and D.C. Circuits' understanding of *Freeman* as "erroneous." Opp. 17. That assertion simply confirms the existing, entrenched circuit split.

III. The Eleventh Circuit Is Wrong.

Finally, the Eleventh Circuit's decision below is wrong on the merits. The concurrence in *Freeman* is not the "narrowest grounds" supporting the *Freeman* judgment. According to the Government, the concurrence is "narrower" than the plurality because, under the plurality's view, the sentencing court "invariably" will rely on the Guidelines if the plea agreement also relies on the Guidelines. Opp. 10. The plurality would therefore "always" grant relief when Justice Sotomayor's concurrence would do so. Opp. 11. Accordingly, the Government says, Justice Sotomayor's concurrence is controlling because "a majority of the *Freeman* Court would agree with whatever *result* flowed from [its] application." *Id*. (emphasis added).

As an initial matter, the Eleventh Circuit employs a "results" analysis even though it is clear that "*Marks* is workable … only when one opinion is a *logical subset* of other, broader opinions." *King*, 950 F.2d at 781 (emphasis added); *see* Pet. 12-13, 17-19, 31-33. The "results" approach treats as binding a legal rationale that every Justice except one has rejected. But

"[w]hen eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." *King*, 950 F.2d at 782.

In any event, whether one applies the results approach or the logical subset approach, it is clear that Justice Sotomayor's *Freeman* concurrence is neither a "middle ground," Opp. 11 (citation omitted), nor a "logical subset" of the plurality opinion. As the Petition explained, there are any number of scenarios in which a sentencing court would grant relief under the *Freeman* concurrence but not the *Freeman* plurality. Pet. 32-33.

The *Freeman* plurality acknowledged that "[e]ven when a defendant enters into an 11(c)(1)(C) agreement, the judge's decision to accept the plea and impose the recommended sentence is *likely* to be based on the Guidelines." 564 U.S. at 534 (emphasis added). But "likely" does not mean always. First, the sentencing judge may never make explicit reference to the Guidelines, even though the plea agreement "express[ly]" relies on them," *Freeman*, 564 U.S. at 539 (Sotomayor, J., concurring), in which case a sentence reduction would be warranted under Justice Sotomayor's concurrence, but not under the plurality opinion. Or, if a sentencing judge rejects the plea agreement's Guidelines range but accepts the agreement anyway, it is the concurrence that might allow future relief, not the plurality. Alternatively, if the plea agreement explicitly contains and refers to a Guidelines range, but the sentencing judge relies on a

different Guidelines range before ultimately accepting the agreement, a future sentence reduction could depend on *which* Guidelines range was modified. If the district court's Guidelines range were later retroactively modified, the *Freeman* plurality would allow relief, but if the Guidelines range proposed by the parties were later retroactively modified, the *Freeman* concurrence would allow relief.

The Government diminishes these examples as unrealistic and inconsistent with *Freeman*, Opp. 13, but they are not abstract hypotheticals. For instance, although this Court mandates that "district court[s] … begin all sentencing proceedings by correctly calculating the applicable Guidelines range," *Gall v. United States*, 552 U.S. 38, 49 (2007), sentencing courts sometimes ignore them. *See, e.g., United States v. Haggerty*, 731 F.3d 1094, 1101 (10th Cir. 2013) ("the district court did not consider the [Guidelines] or its commentary"). It is also a stretch to say that a decision "choos[ing] not to apply" the Guidelines is "based on" those Guidelines. Memorandum Opinion and Order on Sentencing at 8, *United States v. Brownfield*, No. 1:08-cr-00452-JLK (D. Colo. Dec. 18, 2009), Dkt. 48. And in one recent case, the parties expressly agreed to one Guidelines range, while the judge expressly applied a different range. *United States v. Hill,* 674 F. App'x 738 (9th Cir. 2017). The district court there denied the motion for a sentence reduction because the sentence was already at the bottom of the court's amended range. *Id.* The Ninth Circuit affirmed, applying the *Freeman* plurality view. *Id.* at 739 (finding the sentencing judge's reasoning controlling, rather than the plea agreement). Under the *Freeman* concurrence, however, the defendant would have

been eligible for a reduction based on the resulting reduction to the parties' agreed-upon Guidelines range.

The decision of the Eleventh Circuit is wrong. And there can be no serious dispute that this is a significant issue on which the courts of appeals have an entrenched disagreement. This is a highly disputed, highly important question worthy of this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Stephanie A. Kearns
Brian Mendelsohn
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta St., N.W.
Suite 1500
Atlanta, GA 30303

E. Joshua Rosenkranz
Counsel of Record
Eric A. Shumsky
Thomas M. Bondy
Katherine M. Kopp
Alison M. Kilmartin
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

November 17, 2017