No. _____

In the Supreme Court of the United States

Tremell Armstead, *Petitioner*,

v.

United States of America, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Tremell Armstead raises the same question that is currently before this Court in *Hughes v. United States*, No. 17-155 (*cert. granted* Dec. 8, 2017). The question presented is whether—and under what circumstances—a petitioner is eligible for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) based on a retroactive amendment to the Sentencing Guidelines, when the petitioner was initially sentenced after entering into a binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement that required a specific sentence not expressly tied to the Guidelines.

Critical to that primary question are two subsidiary issues: (1) when, under this Court's decision in *Marks v. United States*, a concurring opinion in a 4-1-4 decision represents the holding of the Court; and (2) whether, under *Marks*, lower courts are bound by the four-Justice plurality opinion in *Freeman v. United States*, or, instead, by Justice Sotomayor's separate concurring opinion. These issues are also raised in *Koons v. United States*, 17-5716 (*cert. granted* Dec. 8, 2017), which, like *Hughes*, currently is pending before this Court.

This Court granted petitions for writs of certiorari in both *Hughes* and *Koons*, and thus already has determined that the issues Mr. Armstead raises in his petition are of great importance and meet the criteria set forth in Supreme Court Rule 10.

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On Petition for Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioner Tremell Armstead respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the alternative, Mr. Armstead asks that his petition be held until this Court rules on the questions presented in *Hughes v. United States*, No. 17-155 (*cert. granted* Dec. 8, 2017), and *Koons v. United States*, 17-5716 (*cert. granted* Dec. 8, 2017), and then disposed of as appropriate in light of those decisions.

JUDGMENT AT ISSUE

On December 18, 2017, a panel of the Fifth Circuit Court of Appeals entered an unpublished opinion affirming the judgment of the United States District Court

for the Eastern District of Louisiana. *See United States v. Armstead*, No. 17-30439. A copy is attached to this petition as an appendix. App., *infra*, 1a.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals were entered on December 18, 2017. No petition for rehearing was filed. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

18 U.S.C. § 3582(c) provides as follows:

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

Federal Rule of Criminal Procedure 11 provides as follows:

> (c) Plea Agreement Procedure.
>
> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> . . .
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

STATEMENT OF THE CASE

This case presents the same legal question as *Hughes v. United States*, No. 17-155 (*cert. granted* Dec. 8, 2017), and raises issues closely related to those in *Koons v. United States*, 17-5716 (*cert. granted* Dec. 8, 2017). The question presented concerns 18 U.S.C. § 3582(c)(2), which provides that if a defendant's sentence was "based on" the Sentencing Guidelines, the defendant is eligible for a sentence reduction when the Sentencing Commission later retroactively lowers the Guidelines range applicable to the defendant's offense. The issue is whether—and under what circumstances—a district court has authority to grant a reduction if the defendant's sentence arose out of a plea agreement entered into pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). That rule permits a defendant and the Government to stipulate to a specific sentence in the plea agreement. If the sentencing court accepts the agreement, the stipulated sentence is binding on the court.

Critical to answering this question is determining how appellate courts should interpret this Court's fractured 4-1-4 decision in *Freeman v. United States*, 564 U.S. 522 (2011), which ruled that a defendant who enters into an 11(c)(1)(C) agreement may be eligible for a sentence reduction if the Sentencing Commission subsequently issues a retroactive Guidelines amendment. A circuit split has emerged over what rule should be derived from the *Freeman* decision. Central to this conflict is disagreement about how to determine and apply holdings of plurality decisions under the framework established by this Court in *Marks v. United States*, 430 U.S. 188 (1977). This Court will soon resolve these important questions in *Hughes* and *Koons*.

I. Mr. Armstead enters into a plea agreement under Rule 11(c)(1)(C) and is sentenced to 180 months in prison.

In 2010, Petitioner Tremell Armstead was charged for his part in a multi-defendant drug distribution conspiracy. Mr. Armstead pleaded guilty pursuant to a written plea agreement confected under Rule 11(c)(1)(C), in which he and the Government agreed that a 180-month sentence was the appropriate disposition of his case. In the agreement, the Government also stipulated that Mr. Armstead was entitled to a three-level reduction in his Guidelines offense level based on his timely acceptance of responsibility. The sentencing court conditionally accepted the plea and plea agreement, but deferred final acceptance pending preparation of a Pre-sentence Investigation Report (PSR). The PSR calculated a Guidelines range of 121 to 151 months. This calculation turned on the one-kilogram drug quantity alleged in the indictment, to which the Guidelines assigned a base offense level of 32. In accordance with the Government's recommendation, this base offense level was reduced three levels for Mr. Armstead's acceptance of responsibility.

The PSR noted that the plea agreement called for a sentence above the calculated range—20% higher than the range's upper end. The PSR advised the sentencing judge that the court was permitted to accept the agreement if the court was satisfied that the agreed sentence was within the advisory Guidelines range or if the agreed sentence departed from that range for justifiable reasons. The PSR also identified factors that might warrant a sentence below the calculated range, including that Mr. Armstead's long struggle with opiate addiction had contributed to the offense.

At sentencing, the court formally accepted the plea and the parties' stipulated sentence. The court calculated the correct Guidelines range, took account of the applicable Guidelines and other relevant sentencing factors, and then approved the stipulated 20% upward increase to 180 months. The court explained: "This case involves a Rule 11(c)(1)(c) plea to 180 months which is actually above the Guidelines. My understanding, the Government could have multiple billed Mr. Armstead, in which case he would be facing a minimum of 20 years to life imprisonment, and so I am okay with the 180 months because it's somewhat less than that." Accordingly, the Court sentenced Mr. Armstead to 180 months of imprisonment.

II. Mr. Armstead seeks a sentence reduction under Amendment 782, but the district court determines that it has no authority to grant the motion based on *Freeman* and *Benitez*.

In July 2014, the United States Sentencing Commission announced that Amendment 782 to the Sentencing Guidelines—which reduced by two levels the base offense level for specified drug offenses—would go into effect in November 2015 and would apply retroactively. *See* United States Sentencing Commission, Amendment to the Sentencing Guidelines (July 18, 2014); *see also* U.S.S.G. § 1B1.10. On February 4, 2016, Mr. Armstead filed a pro se Motion for Reduction in Sentence pursuant to 18 U.S.C. § 3582(c)(2), based on Amendment 782's retroactive application to his case. He explained that the amendment reduced his base offense level from 32 to 30, and consequently reduced his applicable sentencing range from 121–151 months to 100–125 months. A screening committee deemed Mr. Armstead potentially eligible for a

sentence reduction, and, accordingly, the court appointed the Federal Public Defender to represent him.

After briefing by both parties, the district court found that it did not have the authority to reduce Mr. Armstead's sentence, citing the Fifth Circuit's decision in *United States v. Benitez*, 822 F.3d 807 (5th Cir. 2016) . *Benitez* held that a sentence imposed pursuant to an 11(c)(1)(C) agreement is only eligible for a reduction when the plea agreement expressly integrates the Guidelines and:

> (i) calls "for the defendant to be sentenced within a particular Guidelines sentencing range;" (ii) provides "for a specific term of imprisonment—such as a number of months—but also make clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty;" or (iii) "explicitly employs a particular Guidelines sentencing range to establish the term of imprisonment."

Id. at (quoting *Freeman*, 564 U.S. at 538–40 (Sotomayor, J. concurring)).

The rule announced in *Benitez* was based Justice Sotomayor's concurring opinion in this Court's fractured 4-1-4 *Freeman* decision. *See Freeman*, 564 U.S. at 534–44 (Sotomayor, J., concurring). In *Freeman*, five Justices agreed that defendants who enter 11(c)(1)(C) agreements are, under certain circumstances, eligible for a § 3582(c)(2) reduction following a retroactive Guidelines amendment, but disagreed about the rationale and when such reductions are permitted. The plurality concluded: "Even 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; and when it is, the defendant should be eligible to seek § 3582(c)(2) relief." *Id.* at 534.

Justice Sotomayor concurred in the judgment but "differ[ed] as to the reason why." *Id.* (Sotomayor, J., concurring). Justice Sotomayor would have held that the proper focus is on what the parties agreed to. *Id*. In Justice Sotomayor's view, a court may reconsider a sentence in this context if the plea agreement "expressly uses a Guidelines sentencing range applicable to the charged offense to establish the [agreed-upon] term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission[.]" *Id.* at 539. The plurality expressly rejected Justice Sotomayor's view that "sentences following 11(c)(1)(C) agreement are based on the agreement rather than the Guidelines, and therefore that § 3582(c)(2) relief is not available in the typical case." *Id.* at 526.

Applying the "narrowest grounds" test announced in *Marks v. United States*, 430 U.S. 188 (1977), the Fifth Circuit in *Benitez* concluded that Justice Sotomayor's concurrence set out the narrower ruling and thus controlled, rather than the four-justice plurality. *Benitez*, 822 F.3d at 811. The court then adopted a test derived from Justice Sotomayor's framework as circuit law governing sentence reduction motions like Mr. Armstead's. *Id*. at 811–12.

The district court applied the *Benitez* test to Mr. Armstead's case, and, in an extended written order, determined that Mr. Armstead's sentence was not "based on" the Guidelines according to that rule. Thus, the court concluded that it did not have the authority to consider a sentence reduction.

III. The Fifth Circuit affirms.

Mr. Armstead timely appealed to the Fifth Circuit. He argued that that the district court erred in determining that it was not authorized to consider a § 3582(c)(2) reduction. Mr. Armstead urged that *Benitez* was erroneous because it misapplied the rule for determining the holding of a fractured Supreme Court opinion and because the rule it adopted from Justice Sotomayor's *Freeman* concurrence is itself erroneous. Mr. Armstead acknowledged that his argument was foreclosed by Fifth Circuit precedent, but raised the issue to preserve it for further review. On December 18, 2017, the Fifth Circuit affirmed the district court's judgment. *United States v. Armstead*, 706 F. App'x 219, 220 (5th Cir. 2017) (unpublished).

IV. This Court grants petitions for writ of certiorari in *Hughes* and *Koons* to resolve identical and related questions to those presented by Mr. Armstead's case.

On December 8, 2017, this Court granted two petitions for writ of certiorari to answer the very questions raised by Mr. Armstead's case. *See Hughes v. United States*, 138 S. Ct. 542 (2017); *Koons v. United States*, 138 S. Ct. 543 (2017). The petitioner in *Hughes v. United States*—like Mr. Armstead—entered into an 11(c)(1)(C) plea agreement in exchange for the Government's dismissal of various counts initially charged. Petition for Writ of Certiorari at 5–6, *Hughes v. United States*, 17-155 (July 27, 2017). That agreement provided for a stipulated 180-month sentence, which the district court accepted. *Id*. at 7. The district court later denied his motion for a sentence reduction based on Amendment 782 because the plea agreement did not mention an otherwise applicable Guidelines range or his criminal

history, and his criminal history category was not evident from the plea agreement itself. *Id*. at 8–9. The Eleventh Circuit affirmed. *See United States v. Hughes*, 849 F.3d 1008, 1015–16 (11th Cir.) *cert. granted*, 138 S. Ct. 542 (2017). Like the Fifth Circuit, the Eleventh Circuit determined that Justice Sotomayor's concurrence in *Freeman* provides the narrowest grounds of agreement and thus controls. *Id*. at 1015. The *Hughes* petition observed that there is now a circuit split over how to analyze *Freeman* in light of this Court's "narrowest grounds" of agreement rule and highlighted the resulting confusion about when a defendant sentenced pursuant to an 11(c)(1)(C) agreement is eligible for a sentence reduction. Petition for Writ of Certiorari at 9–19, *Hughes*, 17-115.

This Court also has granted a writ of certiorari in *Koons v. United States*, a consolidated appeal of five defendants that raises similar issues to those raised in *Hughes*. *See Koons*, 138 S. Ct. at 543. The question presented in *Koons* is whether a defendant who received a sentence below the mandatory minimum due to a substantial assistance motion is eligible for relief under § 3582(c)(2) based on a retroactive Guidelines amendment. Petition for Writ of Certiorari at ii, *Koons v. United States*, No. 17-5716 (Aug. 22, 2017). The petitioners challenge the Eighth Circuit's determination that a reduction is not available, because the defendant's original sentence was not "based on" a Guidelines recommendation at all, but rather on the statutory mandatory minimum that would have applied if no substantial assistance motion had been granted. *See United States v. Koons*, 850 F.3d 973, 976–79 (8th Cir. 2017), *cert. granted*, 138 S. Ct. 543 (2017). There is circuit conflict over

the *Koons* question as well. *Compare United States v. Williams*, 808 F.3d 253, 261 (4th Cir. 2015), *with Koons*, 850 F.3d at 978. And, like Mr. Armstead's case and *Hughes*, the ultimate question in *Koons* hinges on how to apply the fractured *Freeman* decision. *See* Petition for Writ of Certiorari at ii, *Koons*, No. 17-5716.

REASONS FOR GRANTING THE PETITION

I. By granting writs of certiorari in *Hughes* and *Koons*, this Court already has determined that the issues Mr. Armstead raises are worthy of this Court's attention.

The Court should grant Mr. Armstead's petition because it presents the same issues as those raised by the petitioners in *Hughes* and *Koons*. By granting certiorari in those cases, this Court has determined that the questions raised in Mr. Armstead's petition are of great importance and meet the criteria set forth in Supreme Court Rule 10. For those same reasons, Mr. Armstead requests that the Court grant a writ in his case.

In the alternative, this Court should hold Mr. Armstead's petition until it has issued decisions in *Hughes* and *Koons* and then dispose of the petition as appropriate in light of those decisions.

II. This Court should grant Mr. Armstead's petition, because the circuits are deeply divided on this issue, with the majority misapplying *Marks* to interpret *Freeman*.

As explained in the *Hughes* petition, the circuits are split 10-2 over how to interpret *Freeman*. *Compare Hughes*, 849 F.3d at 1015 (concluding that Justice Sotomayor's concurring opinion in *Freeman* controls because it reflects the narrowest result), *Benitez*, 822 F.3d at 811 (same), *United States v. Howell*, 541 F. App'x 13, 14 (2d Cir. 2013) (same), *United States v. Graham*, 704 F.3d 1275, 1277–78 (10th Cir. 2013) (same), *United States v. Thompson*, 682 F.3d 285, 290 (3d Cir. 2012) (same), *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012) (same), *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012) (same), *United States v. Rivera-Martinez*,

665 F.3d 344, 348 (1st Cir. 2011) (same), *United States v. Brown*, 653 F.3d 337, 340 & n.1 (4th Cir. 2011) (same), *and United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011) (same), *with United States v. Davis*, 825 F.3d 1014, 1022, 1027 (9th Cir. 2016) (en banc) (applying the "logical subset" test to conclude that no single rationale in *Freeman* controls, but finding the plurality opinion more persuasive), *and United States v. Epps*, 707 F.3d 337, 348–51, (D.C. Cir. 2013) (same). Specifically, the appellate courts disagree about how to apply *Freeman* in light of *Marks*'s "narrowest grounds" of agreement rule for interpreting plurality opinions. *Marks*, 430 U.S. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ))).

In *Marks*, this Court held that the plurality opinion of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), controlled because the concurrences rested "on broader grounds in reversing the judgment below." *Id.* Thus, the plurality opinion was fully subsumed within the concurring analysis, and a majority of the Court agreed on a rationale that led to the result. However, as the *Hughes* petition explains, *Marks* did not address how courts should read splintered opinions when the plurality and concurrence agree on the judgment but not on any aspect of the underlying rationale.

The Fifth Circuit—like the Eleventh Circuit in *Hughes*—has interpreted *Freemen* in light of *Marks* to conclude that Justice Sotomayor's concurring opinion controls as the "narrowest grounds" of agreement. *Benitez*, 822 F.3d at 811. Thus, "Justice Sotomayor's concurring opinion in *Freeman* . . . establishes the criteria in [the Fifth Circuit] for determining whether the sentence of a defendant who pleads guilty pursuant to a Rule 11(c)(1)(C) plea agreement is 'based on a sentencing range that has been lowered by the Sentencing Commission.'" *Id.* (quoting 18 U.S.C. § 3582(c)(2)).

Benitez misapplies *Marks* to a circumstance for which it was not intended. *Marks* did not specifically address what happens when, as in *Freeman*, the plurality and concurrence agree on the judgment but not on any aspect of the underlying rationale. The Fifth Circuit's adoption of the mutually-exclusive reasoning of the one-justice concurrence over the four-justice plurality is erroneous.

For this reason, both the Ninth Circuit and the D.C. Circuit have applied the "logical subset" test to *Freeman* to conclude that no single rationale in the decision controls. *See Davis*, 825 F.3d at 1021–22; *Epps*, 707 F.3d at 350–51. The D.C. Circuit explained that, when applying *Marks*, the "narrowest opinion must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment." *Epps*, 707 F.3d at 348 (internal quotation marks and citation omitted) (emphasis in original). But, as the court observed, "there is no controlling opinion in *Freeman* because the plurality and concurring opinions do not share common reasoning whereby one analysis is a 'logical

subset' of the other." *Id.* at 350 (internal quotation marks and citation omitted). While the concurring opinion in *Freeman* embraced a parties-focused approach that examined the intent of the agreement, the plurality expressly rejected that view, warning that such a rationale "is fundamentally incorrect because § 3582(c)(2) 'calls for an inquiry into the reasons for a judge's sentence, not the reasons that motivated or informed the parties.'" *Id.* (quoting *Freeman*, 564 U.S. at 533 (plurality op.)). Thus, the D.C. Circuit concluded that because "the set of cases where the defendant prevails under the concurrence is not always nestled within the set of cases where the defendant prevails under the plurality," Justice Sotomayor's opinion cannot control. *Id.* at 351.

The Ninth Circuit, sitting en banc, agreed. That court similarly concluded that there is no controlling opinion in *Freeman*, and, thus, courts are "restricted only by the ultimate result . . . : that defendants sentenced under Rule 11(c)(1)(C) agreements are not categorically barred from seeking a sentence reduction under § 3582(c)(2)." *Davis*, 825 F.3d at 1026.

Answering these questions—which are now before this Court in *Hughes* and *Koons*—will end the deep circuit divide over this issue. It will also provide much needed clarity about how to apply the *Marks* rule, an issue that reaches far beyond this particular context. Importantly, this Court's resolution of *Hughes* and *Koons* also will bear directly on whether the Fifth Circuit erred by affirming the district court's determination that Mr. Armstead was ineligible for a sentence reduction due to his 11(c)(1)(C) agreement. Thus, this Court should grant certiorari in Mr. Armstead's

case as well, or hold his petition pending resolution of *Hughes* and *Koons* so that the petition can be properly disposed of once the questions raised in those cases have been answered.

CONCLUSION

Mr. Armstead's petition for a writ of certiorari should be granted, or, alternatively, held pending this Court's decisions in *Hughes v. United States*, No. 17-155, and *Koons v. United States*, 17-5716, and then disposed of as appropriate in light of those decisions.

Respectfully submitted February 26, 2018,

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