

No. 18-8636

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

BRIAN HOSKINS,  
Petitioner

v.

UNITED STATES OF AMERICA,  
Respondent

---

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

---

REPLY BRIEF OF PETITIONER

---

BARCLAY T. JOHNSON  
Assistant Federal Public Defender  
Counsel of Record

MICHAEL L. DESAUTELS  
Federal Public Defender  
126 College Street, Suite 410  
Burlington, Vermont 05401  
802-862-6990  
[michael\\_desautels@fd.org](mailto:michael_desautels@fd.org)  
[barclay\\_t\\_johnson@fd.org](mailto:barclay_t_johnson@fd.org)

## TABLE OF CONTENTS

Table of Authorities .....	i
Argument.....	1
Conclusion .....	8
Certificate of Service.....	9

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Custis v. United States</i> , 511 U.S. 485 (1995) .....	1, 5, 8
<i>Daniels v. United States</i> , 532 U.S. 374 (2001) .....	1, 5, 8
<i>Freeman v. United States</i> , 564 U.S. 522 (2011) .....	5
<i>Hughes v. United States</i> , 138 S.Ct. 1765 (2018) .....	5, 6
<i>Johnson v. United States</i> , 544 U.S. 295 (2005) .....	1, 5, 8
<i>Molina-Martinez v. United States</i> , 136 S.Ct. 1338 (2016) .....	6
<i>Rosales-Mireles v. United States</i> , 138 S.Ct. 1897 (2018) .....	6
<i>United States v. Hoskins</i> , 905 F.3d 97 (2d Cir. 2018).....	1, 2
<i>United States v. Hoskins</i> , 2016 WL 4154344 (D.Vt.).....	3, 4

### STATE CASES

<i>In re Stocks</i> , 94 A.3d 1143 (2014) .....	8
<i>In re Miller</i> , 975 A.2d 1226 (2009) .....	8

### STATUTES & RULES

28 U.S.C. § 2255 .....	<i>passim</i>
Fed. R. Crim. Proc. 11(c)(1)(C).....	<i>passim</i>

## Introduction

Faced with the prospect of a 151-188 month career offender Guideline range, Brian Hoskins agreed to a Fed. R. Crim. P. 11(c)(1)(C) plea (“C-plea”) for 112 months incarceration. Both the career offender Guideline range and the 112-month C-plea sentence were several times the 37-46-month drug Guideline range calculated in 2012. After a state court predicate conviction was vacated, Mr. Hoskins sought resentencing based on this Court’s decisions in *Custis v. United States*, 511 U.S. 485, 497 (1995), *Daniels v. United States*, 532 U.S. 374, 382 (2001), and *Johnson v. United States*, 544 U.S. 295 (2005). These cases recognize that a defendant who is “successful in attacking [his] state sentences, . . . may then apply for reopening of any federal sentence enhanced by the state sentences.” *Custis*, 511 U.S. at 497. Mr. Hoskins’ 28 U.S.C. § 2255 motion was granted and his sentence was reduced from 112 months to 86 months. On appeal, the Second Circuit reversed. *United States v. Hoskins*, 905 F.3d 97 (2d Cir. 2018).

Mr. Hoskins seeks review of the Second Circuit’s decision, which is inconsistent with Supreme Court precedent that permits a defendant who successfully vacates a state sentence to reopen “any federal sentence enhanced by the state sentences.” *Custis*, 511 U.S. at 497. The opinion is also inconsistent with this Court’s determination that the advisory Sentencing Guidelines remain the central feature of federal sentencing, even when a C-plea is involved. As explained in his Petition, the Second Circuit’s opinion creates a circuit split on the application of this Court’s decisions in *Custis*, *Daniels*, and *Johnson*. Review is necessary to provide guidance and to maintain uniformity in the lower courts.

## Argument

1. The government's brief in opposition attempts to elide the Court of Appeals' fundamental mistake regarding the standard to apply in this case by not acknowledging the 37-46-month drug Guideline range that applied in 2012 and that also applied while Mr. Hoskins' § 2255 motion was pending. Specifically, the Second Circuit based its decision in large part on the fact that the 112-month C-plea in this case fell within the drug Guideline range (100-125 months) calculated later, *at resentencing*. *Hoskins*, 905 F.3d at 104 (offering that Mr. Hoskins' 112-month C-plea fell "in the middle of the Guidelines range applicable to him without a career offender enhancement. This makes it particularly difficult for him to show that such a sentence manifests a complete miscarriage of justice."). But this drug Guideline range was several times higher than the *original* 37-46-months drug Guideline range that was utilized without objection at the 2012 sentencing. It was only this much lower 37-46-month Guideline range that was before the District Court when it accepted the C-plea and when it concluded that Mr. Hoskins' § 2255 motion had merit.

By utilizing this later drug Guideline range as the yardstick by which it judged the District Court's decision, the Second Circuit and the government judge the merits of the § 2255 claim based on events and facts that had yet to be proved when District Court accepted the C-plea and considered the § 2255 claim. This standard puts trial courts in an impossible position and would require the trial courts to employ a crystal ball to divine whether future events might one day render their conclusion flawed. Accepting review in this case will provide needed guidance on

this point and will stop this crystal-ball standard from spreading in § 2255 proceedings.

By way of background, the 2012 PSR calculated the 37-46-month drug Guideline range based on information provided to the probation office by the government. A258-260 (email to USPO summarizing case).<sup>1</sup> The government did not object to the PSR's drug Guideline calculation. Nor did the government object at sentencing when the District Court did its drug Guideline calculation prior to concluding that Mr. Hoskins was a career offender. A076 ("There is a preponderance of evidence that the offense involved at least 11.2 grams but less than 16.8 grams of cocaine base so the base, the base offense level is 20."). In its order granting Mr. Hoskins' § 2255 motion, the District Court accurately summarized the Guideline issue as it stood prior to resentencing when it observed that:

There is no dispute Hoskins' career offender guidelines range was 151-188 months' imprisonment. As a result of the enhancement, his offense level was increased from 20 to 32 and his criminal history category was increased from IV to VI. (Presentence Investigation Report ("PSR") at 5-6, 11.) In the absence of the career offender enhancement, and with credit for acceptance of responsibility and entering a timely guilty plea, Hoskins' guidelines range would have been 37-46 months. See PSR at 5-6, 11; U.S. Sentencing Guidelines Manual Sentencing Table (U.S. Sentencing Comm'n 2011); Doc. 64-3 at 2-3.

*United States v. Hoskins*, 2016 WL 4154344 at \*3 (D.Vt.). The District Court further noted that "it is clear from the PSR, to which the government did not object,

---

<sup>1</sup> Record citations are to the joint appendix—documents 36 & 37—case no. 17-70 (2d Cir.).

and the sentencing transcript that the amount of cocaine base involved in the offense to which Hoskins pleaded guilty under the Rule 11(c)(1)(C) agreement was between 11.2 grams and 16.8 grams—specifically 13.6 grams.” *Id.* at \*4. The 37-46 month drug Guideline range is the range that the District Court considered in 2012 when it accepted the parties’ C-plea because Mr. Hoskins was “facing a lot more time.” A075. That is, the District Court accepted the C-plea because as a career offender Mr. Hoskins’ “faced] a lot more time” than he did as a simple drug defendant.

The 37-46 month drug Guideline range is also the range the District Court considered when it granted Mr. Hoskins’ § 2255 motion. The District Court explained that “[i]n the absence of the career offender enhancement, and with credit for acceptance of responsibility and entering a timely guilty plea, Hoskins’ guidelines range would have been 37-46 months.” *Id.* at \*3. In sum, it was the prospect of leaving the 112-month sentence in place—a sentence based on the 151-188 months career offender range—when the relevant 37-46-month drug Guideline range was a fraction of the C-plea sentence or career offender Guideline range that caused the District Court to conclude that leaving the sentence in place was a miscarriage of justice and warranted § 2255 relief. Leaving the higher sentence in place also violates Mr. Hoskins’ due process rights, as Mr. Hoskins’ argued from the beginning. A088 (explaining in § 2255 motion that “Mr. Hoskins is also entitled to relief because his career offender sentence violates the laws of the United States, violates due process, and results in a fundamental miscarriage of justice.”).

By contrast, the Second Circuit ignored the 37-46-month range and judged the granting of the § 2255 motion not from the point of view of the facts presented to the District Court when it ruled on the § 2255, but based on facts developed *after* the § 2255 was granted. This is an impossible, crystal ball standard that promises to sow confusion in the lower courts. Granting review in this case will allow the Court to clarify the scope of its decisions in *Custis*, *Daniels*, and *Johnson* and will also allow the Court to put an end to this confusing practice.

2. The focus on this later-determined Guideline range distorts the effect the Guidelines have in federal criminal sentencing. The focus also obscures the extent to which the Second Circuit and the government both ignore this Court's oft-repeated admonition that the Guidelines are the foundation and main focus of federal sentencing. The Second Circuit's conclusion that the Guidelines mattered little in this case, especially in light of the C-plea is only possible through its focus on the later-determined Guideline range rather than the 37-46-month Guideline range that the District Court considered when it accepted the C-plea and granted the § 2255 motion.

Even last term, the Court noted that its "precedents since *Freeman* [v. *United States*, 564 U.S. 522 (2011)] have further confirmed that the Guidelines remain the foundation of federal sentencing decisions." *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018). A C-plea is no exception to this rule: "A sentence imposed pursuant to a Type-C agreement is no exception to the general rule that a

defendant's Guidelines range is both the starting point and a basis for his ultimate sentence." *Id.* at 1776.

The Guidelines are so central that this Court has made it clear that any change in the Guidelines range is likely to change a defendant's sentence. *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1346 (2016); *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018) (explaining that a Guidelines error "usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration."). This is true even when, as in *Molina-Martinez*, the error is small and the defendant's sentence still falls within the corrected advisory Guidelines range. 136 S.Ct. at 1346-1348. If even a minor Guidelines error—an error small enough that the defendant's actual sentence still falls within the corrected Guidelines range—affects a defendant's substantial rights and satisfies the plain error standard, the vacating of a conviction that increased a defendant's Guidelines range from 37-46 months to 151-188 months must be a due process violation and amount to a miscarriage of justice and therefore warrant relief under § 2255.

In fact, this case played out just as one would expect given that the Guidelines are still the prime mover of federal sentencing. Here, Mr. Hoskins' explained that the prospect of the career offender sentence was an important consideration for accepting the C-plea. A123. That is, the 151-188 month career offender Guideline thus proved to be the "or starting point" or "lodestone" from which the parties arrived at the 112-month sentence. More importantly, the District Court was clear

that it viewed the C-plea as fair in light of the fact that Mr. Hoskins was “facing a lot more time.” A075. That is, the District Court accepted the 112-month C-plea because as a career offender Mr. Hoskins’ “fac[ed] a lot more time” (151-188 months) than he did as a simple drug defendant (37-46 months).

The Second Circuit’s conclusion that the advisory Guidelines played a minimal role—especially in light of the C-plea—is only possible because it removes the determinative career offender Guideline range and shifts focus to the later-determined drug Guideline range. That is, both the career offender Guideline range and the 37-46-month drug Guideline range that the District Court considered when it accepted the C-plea and granted the § 2255 motion are absent from the equation, thereby distorting the effect of the Guidelines. The conclusion that the advisory Guidelines played a minimal role is inconsistent with established Supreme Court precedent and is indicative of the extent to which the lower courts still struggle with the role the advisory Guidelines play. Review by this Court will provide needed guidance to the federal courts.

3. The government also attempts to trivialize the vacature of Mr. Hoskins’ state drug conviction by characterizing the successful state claim as a procedural one. Opp. at 12, 16, 21, 27. At best, this characterization is incomplete. In his pro se state collateral relief filing, Mr. Hoskins sought to have his sentence vacated both because he was innocent and because there was not a factual basis for the plea. A096-097. Relief was ultimately granted because the state court did not ask Mr. Hoskins if he agreed there was a factual basis for the plea. A091-092. Instead, Mr.

Hoskins' attorney stipulated to the factual basis. Under Vermont state law, a defendant's admission that there is a factual basis is no small matter and "[t]he 'factual basis' requirement reinforces the goal of ensuring knowing and voluntary pleas." *In re Stocks*, 94 A.3d 1143, 1147 (2014). In sum,

Rule 11(f) is intended to prevent the entry of false guilty pleas in situations where, for example, the defendant does not completely understand the elements of the charge or realize that he has a defense. At the heart of Rule 11(f) is the goal of preventing defendants from pleading guilty when the conduct they engaged in does not fall within the charge.

*In re Miller*, 975 A.2d 1226, 1229 (2009). The relevant point being that Mr. Hoskins asserted his actual innocence, the "procedural" error was a significant one that went to the heart of the guilty plea, and the charges were never refiled.

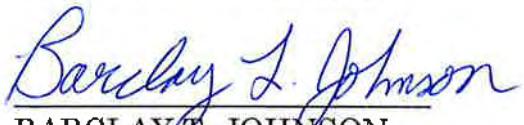
#### CONCLUSION

Mr. Hoskins' case presents the Court with an opportunity to clarify the scope of relief under *Custis*, *Daniels*, and *Johnson*, something it has not done for nearly 15 years. Given the different results obtained in this and other cases, review is necessary to maintain consistent application of this Court's precedent in § 2255 proceedings. The scope of relief under these decisions is "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). This case also presents the Court with an opportunity to provide further guidance on the role of the advisory Guidelines and C-pleas.

For the reasons stated above and in his Petition, Mr. Hoskins respectfully requests that a writ of certiorari be issued.

DATED: June 12, 2019

Respectfully Submitted,

  
\_\_\_\_\_  
BARCLAY T. JOHNSON  
Assistant Federal Public Defender  
Counsel of Record

---

MICHAEL L. DESAUTELS  
Federal Public Defender  
District of Vermont  
126 College Street, Suite 410  
Burlington, Vermont 05401  
802-862-6990  
michael\_desautels@fd.org  
barclay\_t\_johnson@fd.org