

ORIGINAL

No. 9-7130

IN THE  
SUPREME COURT OF THE UNITED STATES

DEC 1 2019

CLERK

UNITED STATES OF AMERICA,

v.

FABIO MOREL

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Fabio Morel, pro-se  
Reg. No.

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SUPREME COURT, U.S.

QUESTION PRESENTED

- I. WHETHER THE LOWER COURT'S DECISION IS IN CONFLICT WITH FREEMAN V. UNITED STATES, 564 U.S. 522 (2011); AND HUGHES V. UNITED STATES, 138 S. Ct. 1765 (2018)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix "A" to the petition.

The opinion of the United States District Court appears at Appendix "B" to the petition.

JURISDICTION

The Court of Appeals entered its judgment on October 4th, 2019. The petition for writ of certiorari was filed on November \_\_\_\_\_, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

18 U.S.C. § 3582(c)(2), " a district court may reduce a defendant's term of imprisonment if his sentence was based on a sentencing range that the United States Sentencing Commission subsequently lowered."

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STATEMENT OF THE CASE

Petitioner was convicted by a jury trial after an eight-day trial of a conspiracy to distribute cocaine and possession with intent to distribute cocaine. Thereafter, on June 6th, 2012, Petitioner was sentenced to 300 months' imprisonment. His conviction and sentence were affirmed on appeal, see United States v. Lopez, 572 Fed. Appx. 1 (2nd Cir. 2014). And, his motion to vacate, correct or set aside sentence pursuant to 28 U.S.C. § 2255 was denied on April 21, 2017.

On January 16th, 2015, Petitioner moved for a sentencing reduction based on Amendment 782 to the United States Sentencing Guidelines. On July 1st, 2015, the Court denied Petitioner's motion, citing the Probation Department's memorandum. Thereafter, (three years later) Petitioner objected to the Probation Department's memorandum. He contended that he was neither charged nor sentenced with respect to any murder. On July 30th, 2018, Petitioner's motion filed under 18 U.S.C. § 3582(c)(2) was denied. And, affirmed by the Court of Appeals for the Second Circuit on October 4th, 2019.

I. WHETHER THE LOWER COURT'S DECISION IS IN CONFLICT WITH  
FREEMAN V. UNITED STATES, 564 U.S. 522 (2011); AND HUG-  
HES V. UNITED STATES, 138 S. Ct. 1765, 1775 (2018)?

Under 18 U.S.C. § 3582(c)(2), a district court may reduce a defendant's term of imprisonment if his sentence was "based on" a sentencing range that the United States Sentencing Commission subsequently lowered. United States v. Borden, 564 F.3d 100, 103 (2nd Cir. 2009). In the case at bar, the district court erred in its determination of whether Petitioner is eligible for a sentencing reduction based on a post-sentence lowering of the Petitioner's Guideline sentencing range. United States v. Christie, 736 F.3d 191, 195 (2nd Cir. 2013).

Petitioner moved for a sentencing reduction based on Amendment 872 on January 16th, 2015. Amendment 782 instituted a two-level, retroactive reduction to the United States Sentencing Guidelines base offense level for certain categories of drug-related offenses. To be eligible for a sentencing reduction, Petitioner's sentence must have been "based on a sentencing range that has been subsequently lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). On June 16, 2015, the Probation Department issued a memorandum stating that Petitioner was ineligible for a reduction because his guideline range was based on the murder committed during the instant offense, and not the amount of the drugs involved. On July 1st, 2015 the District Court denied Petitioner's motion, citing the Probation Department's memorandum.

Notably, in this case Petitioner was not charged with, nor tried for murder. In fact, he was sentenced to 300 months' imprisonment. The Sentencing Court found by a preponderance of the evidence that a murder was committed in the course of the conspiracy, and applied the murder cross reference at U.S.S.G. § 2D1.1(d)(1), which increases an offense level to 43 (life imprisonment) by reference to U.S.S.G.

§ 2A1.1.

It is clear from Petitioner's 300 month sentence, that his sentence was "based on" the amount of drugs involved in the conspiracy. Had the district court used the murder cross-reference Petitioner's sentence would have been life.

LEGAL STANDARD:

"Under federal sentencing law, a district court generally 'may not modify a term of imprisonment once it has been imposed.'" 18 U.S.C. § 3582(c). "This baseline rule is subject to an important exception: a district court may reduce a sentence based on a guideline range that is later lowered by the Sentencing Commission." Id. Deciding whether to reduce a defendant's sentence under 3582(c)(2) is a two-step process. Id. "[A] district court first determines a defendant's eligibility for a reduction." Id. "If a defendant is eligible, the court must then consider the factors in 18 U.S.C. § 3553(a) and assess whether the requested reduction is warranted." Id.

In order to establish eligibility, "a defendant must show (1) that his sentence was 'based on' a guideline range that has since been lowered, and (2) that the reduction he seeks is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Until recently, it was unclear whether the requirement that the sentence be "based on" a Guideline range could be met when the district court imposed a sentence set-forth in a Type-C agreement. In 2018, the Supreme Court held that "a sentence imposed pursuant to a Type-C agreement is based on the defendant's Guideline range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement." Hughes v. United States, 138 S. Ct. 1765, 1775 (2018). But "[i]f the Guidelines range was not a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement, the defendant's sentence was

not based on that sentencing range and relief under § 3582(c)(2) is unavailable." Id. at 1776.

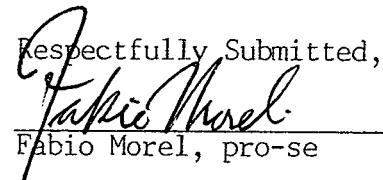
Under the facts of this case, this Honorable Court should conclude that the Petitioner's 300 month sentence was "based on" the Guidelines as that requirement was construed by justices in Hughes, supra., and the majority in Freeman v. United States, 564 U.S. 522 (2011).

The Freeman plurality held that, where a district court accepts an 11(c)(1)(C) agreement, "§ 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to ... approve the agreement." Freeman, 564 U.S. at 530. "[I]f the judge uses the [calculated] sentencing range as the begining point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentencing." Id. at 529.

Here, the district court independently calculated Petitioner's applicable Guidelines range before given the murder cross reference at U.S.S.G. § 2D1.1(d)(1) any consideration. In sum, Hughes and Freeman, appeared to recognize the possibility that a sentence can be based on the Guidelines even if departing or varying from the applicable Guidelines range. On this record, Petitioner's sentence was "based on" the Guidelines. Freeman, 564 U.S. at 534 (stating that "judge's decision to accept the ... plea and impose the recommended sentence is likely to be based on the Guidelines.").

#### CONCLUSION

This Honorable Court should grant the instant petition, and remand the case in light of Hughes and Freeman.

Respectfully Submitted,  
  
Fabio Morel, pro-se